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ABSTRACT

Presented are papers delivered at a 1976 Colorado environmental law conference. Included in the publication are the conference schedule, the text of nine papers, background information on authors, and bibliography listings for each paper. Titles and topics of the papers are the following: (1) Water Resources Development and the Environment discusses water law in Colorado, water resources, and federally reserved water rights; (2) A Panorama of Environmental Laws presents an overview of laws dealing with radiation, noise, historical preservation, pesticides, and wildlife; (3) Federal Freedom of Information Act asks, "Who must disclose what, and to whom?" and "What information qualifies as confidential?"; (4) NEPA: Introduction and Current Developments discusses the National Environmental Policy Act; (5) Development on Federal Lands presents information on overlapping state and federal agencies; (6) Land Use Control in Colorado--Impact on Community Development surveys state legislation involving land use; (7) Air Quality Control discusses regulation of real estate development; (8) National Flood Insurance Program summarizes current developments in insurance coverage regulations; and (9) Water Quality Control discusses regulation of real estate development and water quality standards. (Author/DB)

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ENVIRONMENTAL LAW II

SO 009 496

SATURDAY, SEPTEMBER 11, 1976

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IN COLORADO, INC.

PROGRAM

Update on Environmental Issues

9:00 a.m.	**Water Resources Development and the Environment** Water resource projects; Water rights condemnation; Minimum stream flows.	*Charles Elliott*
9:30	**A Panorama of Environmental Laws** Radiation; Esthetics; Noise; Historical preservation; Pesticides; Wildlife; Solid waste.	*Alan Merson*
10:00	**Federal Freedom of Information Act** Who must disclose what, and to whom? When will a refusal to disclose be sustained? What information qualifies as "confidential"? When can an agency be enjoined from disclosing certain information? 1974 Amendments.	*Kent R. Olson*
10:15	**Break**	
10:30	**NEPA: Introduction and Current Developments** Basic requirements; Circumstances requiring an environmental impact statement; Preparation, contents, and adequacy of an EIS; Judicial review; Programmatic statements.	*Jerry W. Raisch*
11:15	**Development on Federal Lands** States' rights in 1976; State control over federal lands; *Wyoming v. Kleppe*; New coal reclamation regulations; New federal regulations on "commercial quantities" and "diligent development"; Overlapping state and federal agencies.	*Hamlet J. Barry, III*
12:00 noon	**Lunch** "Learning to Love Environmental Lawyers"	*Dr. Patrick Jordon*

Effect of Environmental Laws on Real Estate Development

1:30 p.m.	**Land Use Control in Colorado — Impact on Community Development** Survey of state legislation and interpretive case law authorizing the regulation and control of land use by state agencies, regional entities and local government, with emphasis on communities facing development pressure.	*Michael D. White*
2:10	**Air Quality Control — Regulation of Real Estate Development** Emission control regulations: state and federal; Permit requirements and process; Prevention of significant deterioration: state and federal programs; Indirect source controls; Air pollution monitoring and predictive modeling; Problems and potentialities.	*Gregory J. Hobbs, Jr.*
2:50	**Break**	
3:05	**National Flood Insurance Program** Summary of current developments and its effect on land development.	*John E. Bush*
3:20	**Water Quality Control — Regulation of Real Estate Development** Federal Water Pollution Control Act: construction grants program; Water quality standards and effluent limitations and their application through the NPDES program; Water quality planning; Current status of §404 of the FWPCA. Colorado Water Quality Control Act. Safe Drinking Water Act.	*Henry W. Ipsen*
4:00	**End of Program**	

Water Resources Development and the Environment

WATER RESOURCES AND THE ENVIRONMENT

CHARLES M. ELLIOTT

Associate, Holland & Hart, Denver, Colorado

A.B. Duke University, 1971
J.D. University of Denver, 1973

1974-February, 1976: Assistant Attorney General, Assistant Solicitor General, State of Colorado.

Author: "Aesthetics, Historical Preservation, Noise, et al.," lecture brief in Environmental Law for the Colorado Practitioner, Continuing Legal Education in Colorado, Inc., June, 1975.

"Historic Preservation" The Colorado Lawyer, Vol. 5, No. 2, February, 1976.

"Administration of Water Rights", lecture brief in Colorado Water Law Practice, University of Denver College of Law Program of Advanced Professional Development, 1976.

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I. WATER LAW IN COLORADO - DOCTRINE OF PRIOR APPROPRIATION

A. Colorado follows the doctrine of prior appropriation which is set forth in the state constitution (Art. XVI, Secs. 5, 6 & 7). This doctrine is based upon use in an economic, consumptive sense. The constitutional status and the inflexible property right nature of water rights impede statutory changes to reflect environmental concerns.

B. Water rights - Acquired by making an appropriation (historically, a diversion of water from its natural course or location and application of the same to beneficial use; now defined by statute as only an application to beneficial use) C.R.S. 1973, § 37-92-103(3).

C. Beneficial use -

1. Definition - "The use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife" C.R.S. 1973, § 37-92-103(4).

2. Colorado case law has recognized domestic, agricultural, manufacturing, mining, watering lawns, power generation, stock watering, fish propagation, and municipal as beneficial uses.

3. ". . . We think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to beneficial use designed." Coffin v. Left Hand Ditch, 6 Colo. 443, 449 (1882). Therefore, Colorado law has no geographical limitation as to place of use and transmountain and transbasin diversions are lawful (subject to protection of other rights).

D. All decreed water rights lie within a priority system in which appropriators are shut off in inverse order of their priority numbers in times of shortage.

E. Bibliography

1. Carlson, "Report to Governor John A. Love on Certain Colorado Water Law Problems, 50 Denver L. J. 293 (1973).

2. Note, A Survey of Colorado Water Law, 47 Denver L. J. 226 (1970).

3. Radosevich, et al. Evolution and Administration of Colorado Water Law: 1876-1976, Water Resources Publications, Ft. Collins, Colo. 1976.

II. WATER RESOURCES AND WATER RESOURCES DEVELOPMENT IN COLORADO

A. The following materials have been extracted from various sources (as noted) to provide the fundamental information as to water resources in Colorado and their development.

B. Bibliography (in addition to the sources from which the following materials were extracted).

1. Critical Water Problems Facing the Eleven Western States, Westwide Study U.S. Dept. of the Interior, May 1974.

2. Colorado's Water Resources, Colorado Water Conservation Board, 1956 (2d Ed.)

3. Mineral and Water Resources of Colorado, Senate Document No. 115, 90th Congress, 2d Session U.S. Geological Survey (1968).

4. Mineral and Water Resources of Colorado, Committee on Interior and Insular Affairs, 88th Congress, 2d Session, U.S. Geological Survey (1964).

Although the recent decline in birth rates and fertility rates has been dramatic, we are just now approaching the lower rates characteristic of Europe, rates still generating a significant population growth.[31] These trends do suggest that if all people had equal opportunity to control their reproductive lives, then a significant step toward stabilizing the population would have been accomplished.

WATER RESOURCES

Water is the most abundant single substance in the earth's biosphere. It is the medium of life processes, continually circulating through the water cycle, constantly used, but essentially never destroyed. The earth contains about 1.5 billion cubic kilometers of water in one form or another. About ninety-seven percent of this is present as salt water in oceans and seas. Of the remaining, three-fourths is locked up as solid in polar ice caps and glaciers. Only about 0.15 percent is present as liquid water in streams and lakes.[32]

Average annual precipitation over the world is about forty inches. Over land areas, it is twenty-eight inches. Over the United States, it averages about thirty inches, or 4,310 billion gallons per day.[33] Average annual precipitation is sixteen inches in Colorado; however, it varies from a high of more than fifty inches in some mountainous areas, to a low of seven inches at Alamosa in the Rio Grande Basin.[34]

The maximum dependable stream flow in the United States is 1,080 billion gallons per day, about twenty-five percent of the average precipitation. However, it is not uniformly distributed. The eastern portion of the country, roughly everything east of a line through the Kansas-Missouri border, claims 790 billion gallons per day, or 73.1 percent. The Pacific Northwest, mostly Washington, Oregon, and Idaho, claims 136 billion gallons per day. The remaining 14.2 percent, 154 billion gallons per day, is shared by fourteen western states comprising over one-half of the country's land area. Colorado literally sits at the apex of this dry western region.[35]

Water usage falls into three classes; namely, (1) consumptive uses, (2) stream-flow uses, and (3) on-site uses. Consumptive use comprises municipal-industrial-type diversions and agricultural irrigation; it means ultimate consumption by evaporation or transpiration, or incorporation of water in manufactured products. Stream-flow use includes stream uses for navigation, recreation, maintenance of fish habitat, hydroelectric power generation, and probably most important of all, waste carriage and disposal. Several stream-flow uses can be accommodated simultaneously. On-site use includes water for swamps, wetlands, wildlife preserves, and certain soil conservation projects (including farm ponds).

In assessing water needs for the future, all three uses defined above must be considered. The quality of the environment will depend on the quality of water as affected by type of use, and the quality of human existence will depend partly on our policies defining the use hierarchy.

WATER RESOURCES IN THE WEST

In the western fourteen states, stream flow can be divided into eight subregions, each essentially a river drainage basin. About sixty percent of the water supply occurs in two of these subregions, the Western Gulf Basin (essentially central and southeast Texas) and the Central Pacific Basin (northern California, including the Sacramento Valley). The central portion of the West, the Rocky Mountain Region, is most deficient in supply relative to existing and projected uses; and here the stringency is most serious in the Rio Grande and Pecos basins, the Colorado River Basin, and the South Pacific Basin. Much of Colorado is included in these water-deficient regions.[36]

Irrigation accounts for the major consumptive use of water in the West. In 1970, irrigation consumed 57.7 billion gallons per day, or 93.7 percent of consumptive uses. In contrast, power plants consumed 0.1 billion gallons per day, municipalities consumed 2.9 billion gallons per day, and manufacturing consumed 0.9 billion gallons per day. By the year 2000, Resources for the Future, Inc., predicts consumptive use of 91.7 billion gallons per day for the West, with irrigation taking ninety percent of that. This is 59.6 percent of the maximum dependable stream flow for the region.[37]

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[31] Keyfitz and Flieger, *op. cit.* (ref. 10), pp. 86-107.

[32] H. L. Penman, "The Water Cycle," *Scientific American*, vol. 223, no. 3, pp. 99-103, September 1970.

[33] *Ibid.*

[34] *Mineral and Water Resources of Colorado*, Report compiled by United States Geological Survey, p. 233, U. S. Government Printing Office, Washington, D. C., 1968.

[35] Hans H. Landsberg, Leonard L. Fischman, and Joseph L. Fisher, *Resources in America's Future*, pp. 378-380, The Johns Hopkins Press, Baltimore, Maryland, 1963.

[36] *Ibid.*, pp. 259, 382-383.

When stream-flow uses and on-site uses are added to consumptive uses, total water demand for the West is put at 215.4 billion gallons per day in 2000, nearly forty percent above the maximum dependable stream flow of 154.1 billion gallons per day. The situation is more serious than these figures indicate, since actual available stream flow is less than the maximum dependable and is a function of water storage facilities, as well as annual rainfall. For example, with 1954 storage facilities, stream flow available fifty percent of the time was 69.3 billion gallons per day, only thirty-two percent of projected requirements for the year 2000.[38] Even today, water needs exceed supply, meaning inadequate water is available for some needs; in particular, stream flow is insufficient at times for diluting waste, thus resulting in water pollution.

For the West, the choice is clear. Either total use is brought into line with supply, or one type of use must be sacrificed to maintain another. The only other alternative is to import water from water-surplus areas. Importation, however, is an illusory solution. Many questions need to be answered regarding the environmental impact of such transfers but, more significantly, they are not a permanent solution to increasing water demand. The Pacific Northwest surplus in 2000 will just about equal the West's deficiency at that time, leaving no extra supply for increasing demand beyond the year 2000.[39] Water transfer from Canada is often proposed as a solution. Speculation usually envisions the transfer of about seventy million acre-feet per year.[40] Formidable political obstacles stand in the way of this proposal, and costs would be great, possibly around a quarter trillion dollars. What would such a transfer accomplish? Assuming one-half goes to agriculture, with five hundred gallons per day being required to feed one person, this transfer would feed an additional 128 million people. That is about equal to the likely increase in United States population during the thirty to fifty years required to implement this proposal. So, once again we are faced with the question, "What have we really accomplished, and what do we do next?" A final thought: water transferred at such cost is likely to be too expensive for agricultural use.

COLORADO'S WATER RESOURCES

Nearly all waters within the state originate here. Little water flows into the state from outside, and eighteen states share in the use of our waters. All waters originating in Colorado are allocated for interstate use by interstate compacts or Supreme Court decisions, the Colorado Compact being the major one. The State Engineer of Colorado is charged with administering the state's water resources.

The stream systems in Colorado produce about sixteen million acre-feet of virgin stream flow annually. Of this, the Colorado River and its tributaries in Colorado produce eleven million acre-feet; but, by interstate compact, Colorado is restricted to 34.7 percent of this part of the upper Colorado River supply; the rest is allocated to other states. Annual virgin stream flow in the South Platte Basin is 2.2 million acre-feet; Colorado is legally entitled to 2.1 million acre-feet, or nearly all of this. Annual flow in the Arkansas Basin is 1.17 million acre-feet; Colorado's legal share is 1.12 million acre-feet. Virgin annual stream flow is 1.4 million acre-feet in the Rio Grande Basin; Colorado's share is 1.01 million acre-feet. Thus, Colorado is entitled to some eight million acre-feet of total stream production, about one-half of the total.[41]

Underground water supplies are extensive in Colorado but vary in type and quality. There is little ground water on the western slope. Some ten million acre-feet are estimated to be in place under the South Platte River, and two million acre-feet under the Arkansas River. These waters are largely recharged with percolated waters from the respective rivers, their tributaries, irrigation, and precipitation; therefore, these waters are actually part of the stream-water system. Some two billion acre-feet of water underlies the Rio Grande Basin, but most of it is too deep for economic development.[42]

The major designated ground-water basins in Colorado, however, are the northern high plains and the southern high plains. The northern high plains are essentially that area covered by the Republican River and the Smoky Hill River drainages in Colorado. The southern high plains consist of Baca County and that portion of Powers County lying southeast of Two Buttes Creek in Colorado. There is essentially only one aquifer present in the northern high plains, the Ogallala Formation; while in the southern high plains there are three substantial aquifers: the Ogallala Formation, the Dakota Formation, and the Cheyenne Formation. The estimated recoverable water from the Ogallala Formation in the northern high plains is forty-eight million acre-feet, or fifty percent of the total storage. About thirty million acre-feet of recoverable water are stored in the three major aquifers of the southern high plains (Ogallala, Dakota, and Cheyenne Formations).[43]

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[37] *Ibid.*, pp. 260-249.

[38] *Ibid.*, pp. 380-383.

[39] *Ibid.*

[40] Ehrlich, *et al*, *op. cit.* (ref. 4), pp. 93-94.

[41] Data supplied by C. J. Kuiper, State Engineer, Division of Water Resources, Colorado Department of Natural Resources; also, Testimony by Felix L. Sparks, Director, Colorado Water Conservation Board, before the Committee on Water and Related Problems of the Colorado Environmental Commission, January 1971.

[42] *Ibid.*

Of the underground waters, it is estimated that 100 million acre-feet might be economically recoverable,[44] but steady-state production is a function of aquifer characteristics and recharge rates. We might expect a net potential sustainable supply of 1.5 million acre-feet per year. This resource must be carefully managed or we can deplete in decades what took tens of thousands of years to accumulate.

WATER-USE PATTERNS IN COLORADO

In 1970, irrigated acreage in the state totaled 4,205,000 acres. Water distributed to this acreage was 16,500,000 acre-feet; of this, some 5,700,000 acre-feet are estimated to have been consumed by evaporation-transpiration.[45] About thirty-seven percent of irrigation-water diversion in Colorado occurs in the South Platte and Arkansas basins. In the South Platte Basin, some 4.4 million acre-feet are diverted, with 1.6 million acre-feet of this being pumped from wells. In the Arkansas Basin, 2.17 million acre-feet are diverted for irrigation, 170,000 acre-feet of this by subsurface pumping. Since 1935, major pump installations along the Platte and Arkansas rivers, those delivering 1,000 to 3,000 gallons per minute, have increased from 350 to 17,500; countless pumping installations are smaller.[46]

On the high plains of Eastern Colorado, water is being pumped from the Ogallala, Dakota, and Cheyenne formations to sustain irrigated agriculture; and, generally speaking, the water withdrawal rates exceed the replenishment rates. In the northern high plains, there are approximately 3,200 wells presently pumping about 560,000 acre-feet of water annually from the Ogallala Formation. Eighty-five percent, or 476,000 acre-feet, of water withdrawn by pumping is consumed and amounts to depletion of the aquifer. The estimated recharge to this aquifer is 405,000 acre-feet per year and has not changed as a result of pumping development. Prior to development, this recharge maintained equilibrium of the water storage and generally does not replace depletion by well pumping. The Colorado Ground Water Commission, which administers the use of water in designated ground-water basins, is limiting the maximum allowable appropriation of water in the northern high plains so that there will be a possible maximum aquifer depletion of forty percent in twenty-five years. In connection with this limitation, there is a minimum well spacing of one-half mile between wells.

There are approximately 930 wells presently withdrawing an estimated 100,000 acre-feet of water annually from the aquifers of the southern high plains. About 85,000 acre-feet of this water are consumed annually and represent a net depletion of the aquifer. The total recharge to the three aquifers is estimated to be 95,000 acre-feet per year, the point of equilibrium of storage prior to large-scale withdrawal. None of this recharge is considered to be available for replacement of water withdrawn by well pumping. At the present time, because of a serious lack of data on the geology and hydrology of the southern high plains, the only administrative policy which the Colorado Ground Water Commission exercises in this area is one-half-mile spacing between wells.

There are four smaller designated ground-water basins wherein the withdrawal of underground water exceeds the recharge in about the same proportion as the two major basins.

In summary, underground water is being "mined" as a finite resource in designated ground-water basins to the extent that at some point in time the economic base for a large geographic area of the state will be eliminated.[47]

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[43] *Data by Kuiper, op. cit. (ref. 41).*

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid.*

[47] *Ibid.*

Municipal-industrial uses withdraw considerable water but completely consume only a small fraction. Manufacturing generally consumes less than five percent of water used, while thermal power plants consume about 0.5 percent of water used; however, these two uses account for about fifty-five percent of all water diversions. Municipalities divert a small amount of the water, about 4.5 percent, and account for about the same proportion of consumptive use. Lawn irrigation and air conditioning are responsible for most of the municipal consumptive use.[48]

Colorado's water-consumption pattern closely parallels the rest of the West. Currently, irrigated agriculture accounts for 93.9 percent of consumptive use. Municipalities are responsible for three percent of total consumption; industry another 2.8 percent; while other uses account for 0.3 percent.[49]

Denver is probably typical of western cities as far as water use is concerned. Per capita consumption is higher than the national average, being 204 gallons per day per person compared to municipal averages of 125 to 165 gallons per day per person. In 1970, the Denver Water Board delivered 59.5 billion gallons of water (182,700 acre-feet) to 800,000 people.[50] Of the water delivered, about thirty-five percent was actually consumed. Consumptive water use by Denver is 46.6 percent of all municipal water consumption in the state, or 1.4 percent of the state's consumptive use.[51] At the end of 1970, Denver had 499,039 acre-feet of water in storage, in six reservoirs with a combined storage capacity of 500,000 acre-feet, sixty percent of this on the west slope. Future plans call for expanding Denver's water supply to 600,000 acre-feet by 2008. With water reuse schemes, the usable supply is expected to be 800,000 acre-feet, enough to supply 3.5 million people.[52]

WATER AND COLORADO'S FUTURE

How is Colorado's future to be affected by the water-resource picture? The supply is limited, and fifty percent of the surface water goes downstream in two months, May and June. Storage is necessary if we are to utilize the water to which Colorado is entitled. However, water development on a major scale is approaching an end.

Two major projects planned for the future are in the South Platte Basin; these are the Lower South Platte Water Conservation Project (Narrows Dam) and possibly the Two Forks Project. Both projects are aimed at conserving water lost to us through flooding and winter flow. Five projects planned in the Colorado River Basin will approach Colorado's allowable depletion in periods of low water supply.

We are out of surface-water supply in the Rio Grande Basin, and as a result of suits brought against Colorado by the State of Texas and the State of New Mexico, we are under obligation to assure these states at least the scheduled compact delivery each year; Texas and New Mexico allege that we are in arrears by 800,000 acre-feet in meeting past commitments.[53]

There is an overall water shortage in the Arkansas Basin. The future of water development there hinges more on efficient management of water.

As water use becomes more intense, being reused more as it moves downstream, we face the problem of salt. Repeated use increases salt content, progressively reducing water quality; too much salt renders water useless for agriculture. Salt content in the Arkansas River now reaches 3,000 parts per million as it leaves the state. California expresses concern for the increasing salt content in the Colorado River, saying salt content could be up to 1,200 parts per million by 2020.

Too much salt could halt water development in the state. The Environmental Protection Agency is studying the adoption of water-quality standards which put a ceiling on salt content. The situation is most critical in the Colorado River Basin, and water diversion from the west slope to the east slope intensifies the problem as this removes high-quality water, increasing the percentage of salt content of the remaining water.[54]

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[48] Landsberg, et al, *op. cit.* (ref. 35), pp. 262-266.

[49] *The Denver Post*, Bonus Section, December 14, 1971, p. 8.

[50] Testimony by James Ogilvie, Manager, Denver Water Board, before the Committee on Water and Related Problems of the Colorado Environmental Commission, January 1971.

[51] *The Denver Post, loc. cit.* (ref. 49); also, Testimony of James Ogilvie, *op. cit.* (ref. 50).

[52] Testimony of James Ogilvie, *loc. cit.* (ref. 50).

[53] Testimony by Sparks, *loc. cit.* (ref. 41); also, Data by Kuiper, *loc.cit.* (ref. 41).

What are the possibilities of augmenting our water supply both to provide more water and to maintain stream standards? Tests with cloud seeding indicate we might increase precipitation in selected locales by possibly fifteen to twenty percent. As for desalinization, Colorado has no apparent significant supply of salty or brackish water to desalt, and economics preclude importing desalted sea water.

Colorado's original water supply, then, is what it was one hundred years ago. Weather modification may have some impact, and our supply is not likely to be increased by water importation for at least thirty to fifty years, if ever. We must plan our future within these constraints.

Colorado's assets include the natural beauty of this state. Water is an integral part of that asset. At reservoirs constructed in Colorado by the Bureau of Reclamation, visitation is now over two million man-days per year. More thought now goes into landscaping and development of shorelines.[55] Water is essential to the streams for support of wildlife and waste dilution, as well as providing recreational assets. These are part of our stream-flow and on-site uses.

If we assume stream-flow and on-site uses are typical of such needs projected for the West,[56] then possibly nine million acre-feet of our water resources should be reserved annually for these two uses, including flow on the Colorado River claimed downstream. That leaves some 5.5 million acre-feet of surface water annually (after compact commitments), plus possibly 1.5 million acre-feet of ground water, for consumptive uses. Presently, Colorado consumes 7.2 million acre-feet a year: 6.1 million acre-feet of this from stream flow, the rest from underground sources.[57] Assuming stream-flow and on-site uses as projected for the West and current consumptive use, some uses will have to be curtailed in preference to others. Invariably, municipal-industrial interests have "outbid" agriculture and other uses, and stream-flow needs are often sacrificed. It, therefore becomes important for the citizens of Colorado to set goals for the type of state they want and to decide what part water-resource management will play in attaining these goals.

COLORADO AND ENERGY

Looking ahead to the next one hundred years, energy use looms as a major factor of environmental concerns, and Colorado will play a major role in the world's energy story. Three things stand out in assessing the future use of energy. These are:

1. Energy consumption is very large today, but if predictions being made hold, then future uses will be enormous.
2. The fuel "mix" will change, and Colorado is likely to become a major energy state.
3. Environmental concerns, especially for air and water pollution, will become an economic factor.

Until the industrial revolution, energy consumption was very small. Wood was the primary fuel consumed, and manpower and animal power did the work. With the coming of the industrial revolution, man first used fuel-consuming machines to do some of the work. With the invention of the internal-combustion engine and electrical power, the modern industrial age arrived. With it, energy consumption on a large scale began.

In the nineteen and one-half centuries up to 1950, it is estimated that the world may have consumed 13 x 10^{18} Btu * of energy, the equivalent of 540 billion tons of coal or 1,590 billion barrels of oil.[58] In the last half of this century, the world is expected to consume that same amount of energy again. In fact, if growth in energy demand continues as it has since World War II and as predicted by many studies, the world will consume in any thirty- to forty-year period as much energy as in all previous history. Between 1960 and 2050, world consumption of energy is predicted to

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[54] *The Denver Post*, December 15, 1971, p. 78.

[55] Testimony by Sparks, *loc. cit.* (ref. 41).

[56] Landsberg, et al, *op. cit.* (ref. 35), p. 271.

[57] Data by Kuiper, *loc. cit.* (ref. 41).

[58] Chauncey Starr and Craig Smith, "Energy and the World of A.D. 2000," *Engineering for the Benefit of Mankind*, A symposium held at the Third Autumn Meeting of the National Academy of Engineering, pp. 1-24, National Academy of Engineering, Washington, D. C., 1970.

*Btu = British thermal unit, the amount of heat required to increase the temperature of one pound of liquid water by one degree Fahrenheit. Boiling water, at atmospheric pressure, absorbs 970 Btu's per pound vaporized.

Colorado's Major River Basins

Four major river basins drain most of Colorado, all with their headwaters in the high mountains of the Continental Divide. The South Platte flows northeast into Nebraska, the Arkansas runs southeast into Kansas, the Rio Grande flows south into New Mexico, and the Colorado drains westward into Utah. Rivers east of the Divide flow ultimately into the Gulf of Mexico, while the western streams find their way, via the Colorario River, to the Gulf of California and the Pacific Ocean.

COLORADO RIVER

The Colorado River system drains over one third of the state's area. Originating in the north central mountains, the main stream of the Colorado flows southwesterly, is met at Grand Junction by the Gunnison River and continues west into Utah. The Yampa and the White move westward across the northwest quadrant of the state and to the Utah border where they join the Green, another tributary of the Colorado. The San Miguel and the Dolores begin near the southwestern corner and travel north along the western border. The San Juan and its tributaries collect the water in the southernmost regions west of the Divide and carry it into New Mexico.

Less than 20% of the Colorado River Basin lies inside Colorado, but about 75% of the water in the river originates in the state. The area receives nearly 60% of the state's total precipitation, but has less than 20% of its population. However, millions of gallons of this seemingly surplus water have been allotted, by treaty, compact and diversions, to a variety of claimants in eastern Colorado, in several other states and in Mexico. Now, Colorado residents of the Colorado River watershed have the use of less than half the water flowing there.

SOUTH PLATTE RIVER

The South Platte River drains the most populous section of the state and serves the area with the greatest concentration of irrigated agricultural lands. Its waters originate chiefly in the mountain streams along the north half of the Front Range of the eastern slope. The main stream moves north, then east, and meets the North Platte in southwestern Nebraska. The basin includes less than 20% of the state's area but over 60% of the population lives there.

A large portion of the water diverted from the Colorado River is used in this region. Here new industry and rapidly expanding urbanized areas compete with agriculture for the limited and costly supply of water.

Although data indicates both rural and urban centers are growing, this growth does not represent agricultural growth since the trend is toward urbanization. Less than one third of the land in this basin is public land.

ARKANSAS RIVER

The Arkansas River begins in the central mountains of the state, near Leadville. It travels eastward through the southern part of Colorado toward the Kansas border. Several tributaries flow from the high southern mountains toward it from the southwest, and there is some drainage from the higher plains north of the main stream.

The basin includes slightly less than one third of the state's land area and almost 25% of the state's population. Over 20% of the land is publicly owned. A high percentage of the land is devoted to agriculture and about one third of this land is irrigated. Increasing urbanization is apparent in the Arkansas River Basin.

RIO GRANDE RIVER

The Rio Grande drainage basin is located in south central Colorado and is comparatively small with less than 10% of the state's land area and only about 2% of its population. Land is about evenly divided between public and private ownership.

It is largely rural and it contains approximately 15% of the irrigated land in Colorado. Since it lies between two high mountain ranges, the San Juan and the Sangre de Cristo, it is somewhat isolated. This factor coupled with a lack of employment opportunities has resulted in a recent decline in population. Because of the low population density the Rio Grande is the only large river that leaves Colorado with relatively clean water.

8

Water Storage Projects

Dams and reservoirs are built to prevent flood damage and to retain the surplus water for use during periods of insufficient flow. Huge sums of money have been spent on projects in the western United States by governmental and private agencies. In the past storage projects were built primarily for irrigation and hydroelectric power, and there was very little coordination. A cooperative, multi-purpose program is a more modern approach. Projects constructed by private individuals, corporations and municipalities are usually single-purpose. In semi-arid Colorado some reserve supply is necessary for municipalities and irrigation.

There are many conflicting points of view regarding future storage projects. International treaties, interstate compacts, the prosperity and rights of the Ute Indians, energy problems, agricultural development, recreational needs, environmental impact, and general socioeconomic concerns are all factors which might enter into decisions on water management and use.

Several authorized federal projects for Colorado are in various stages of development. Some have been started but are waiting for final appropriations; others are still in the planning process.

Project	*Year authorized*	*Location*	*Volume in acre-feet*	*Purpose*
1. Fruitland Mesa	1964	Gunnison River Basin	57,900	Irrigation and public works
2. Savery-Pot Hook	1964	N.W. Colorado Little Snake	29,000 (Colo.) 22,400 (Wyo.)	Irrigation
3. Animas-LaPlata	1968	S.W. Colorado	201,600	Multi-purpose
4. Dallas Creek	1968	S.W. Colorado	66,300	Multi-purpose
5. Dolo[illegible]	1968	S.W. Colorado	126,000	Multi-purpose
6. San Miguel	1968	S.W. Colorado	122,000	Multi-purpose
7. West Divide	1968	West Central Colorado	193,100	Multi-purpose
8. Narrows	1946			
halted	1952	N.E. Colorado	400,000	Irrigation
reauthorized	1970			Recreation
9. Closed Basin	1972	San Luis Valley	100,800	Treaty and compact obligations Irrigation and wildlife

COLORADO WATER, League of Women Voters (1975)

TRANS-MOUNTAIN DIVERSIONS

see map page 11

DIVERTED FROM	VIA	DIVERTED TO	AVERAGE ACRE FEET*	USED IN DIVISION #
Colorado R.	*Adams Tunnel*	**Big Thompson R.**	206,338	1
Eagle River	*Aurora-Homestake*	**South Platte R.**	5,312	1
Fraser River	*Berthoud Pass*	**W. Clear Creek**	575	1
Nunn Ck.-Laramie R.	*Bob Creek*	**Roaring Ck.-Poudre R.**	—	1
Indiana Creek	*Boreas Pass*	**Tarryall Creek**	111**	1
Michigan R.	*Cameron Pass D.*	**Wright Ck.-Poudre R.**	155.8	1
Deadman Creek	*Columbine D. (Platte)*	**N. Fork Poudre R.**	—	1
Deadman-Sand Ck.	*Deadman D.*	**Sheep Ck.-Poudre R.**	703	1
Colorado R.	*Eureka D.*	**Big Thompson R.**	94	1
Colorado R.	*Grand River D.*	**Cache La Poudre R.**	15,870	1
Blue River	*Hoosier Pass Tunnel*	**Middle Fk. South Platte**	8,602	1
Laramie R.	*Laramie-Poudre Tunnel*	**Poudre R.**	15,394	1
Michigan Creek	*Michigan D.*	**Wright Ck.-Poudre R.**	1,890**	1
Fraser River	*Moffat Tunnel*	**So. Boulder Ck.**	43,244	1
Blue River	*Roberts Tunnel*	**N. Fk. South Platte**	22,480	1
W. Fk. Laramie R.	*Skyline D.*	**Cache La Poudre R.**	2,222	1
Williams Fk. R.	*August P. Gumlick Tunnel*	**W. Clear Ck. or S. Boulder Ck.**	3,066	1
Sand Creek	*Wilson Supply D.*	**Sheep Ck. Poudre R.**	1,815	1
Montezuma Creek	*Vidler Tunnel*	**Clear Creek**	57**	1
Fryingpan River	*Chas. H. Boustead Tunnel*	**Lake Fork-Arkansas R.**	36,580**	2
Fryingpan River	*Busk-Ivanhoe Tunnel*	**Lake Fork-Arkansas R.**	7,050	2
Eagle River	*Columbine D. (Ark.)*	**Arkansas River**	1,795	2
Piney Creek	*Ewing D.*	**Arkansas River**	1,159	2
Eagle River	*Homestake Tunnel*	**Arkansas-S. Platte R.s.**	27,788	2
Marshall Creek	*Larkspur D.*	**Poncha Creek**	525	2
Roaring Fork R.	*Twin Lakes Tunnel*	**Lake Ck.-Arkansas R.**	52,816	2
Piney Creek	*Wurtz D.*	**Arkansas River**	3,290	2
Piney Creek	*Wurtz Extension*	**Arkansas River**	1,090	2
N. Fk. Los Pinos	*Pine R.-Weminuche Pass*	**Rio Grande R.**	530	3
Piedra River	*Don La Fonte #1*	**S. River-Rio Grande**	388**	3
Piedra River	*Don La Fonte #2*	**S. River-Rio Grande**	55**	3
Rincon La Vaca Ck.	*Raber-Lohr D. (Weminuche Pass)*	**Rio Grande River**	1,802	3
Williams Creek	*Squaw Pass D.*	**Squaw Creek**	168	3
Cebolla Creek	*Tabor D.*	**Rio Grande R.**	745	3
Cochetopa Ck.	*Tarbell D.*	**Saguache Creek**	365	3
San Juan R.	*Treasure Pass*	**Rio Grande R.**	385	3
San Juan R.	*San Juan-Chama*	**Chama R.**	174,920**	New Mexico

*five year average—1969-1973

**no five year figures—figure for last year of diversion

Diversion or divert means removing water from its natural course or location, or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump or other structure or device.

Colorado Revised Statutes C.R.S. '63, 148-21-3(5)

WATER FOR TOMORROW: Colorado State Water Plan, Phase 1, Bureau of Reclamation in cooperation with the State of Colorado Feb. 1974

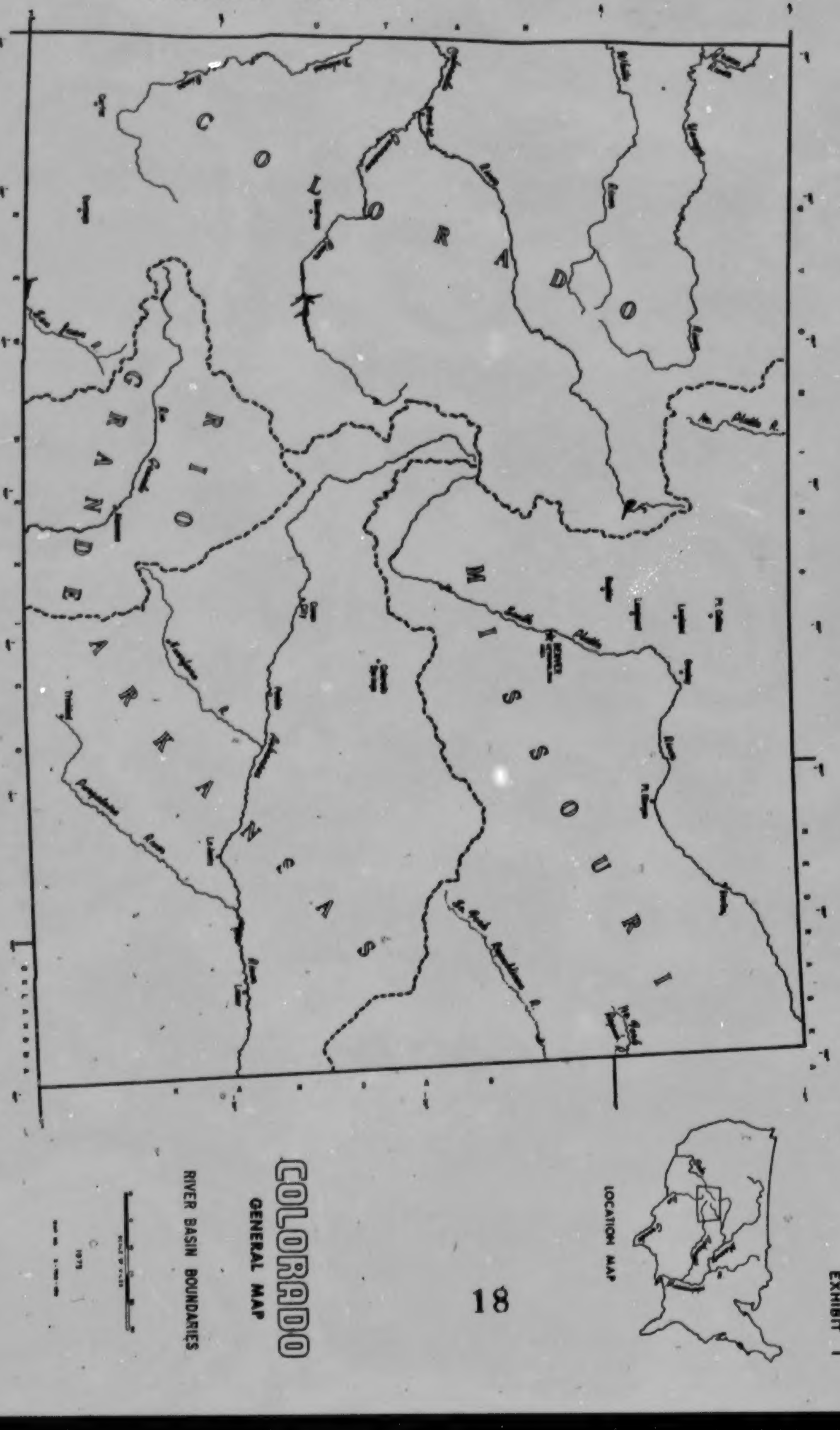
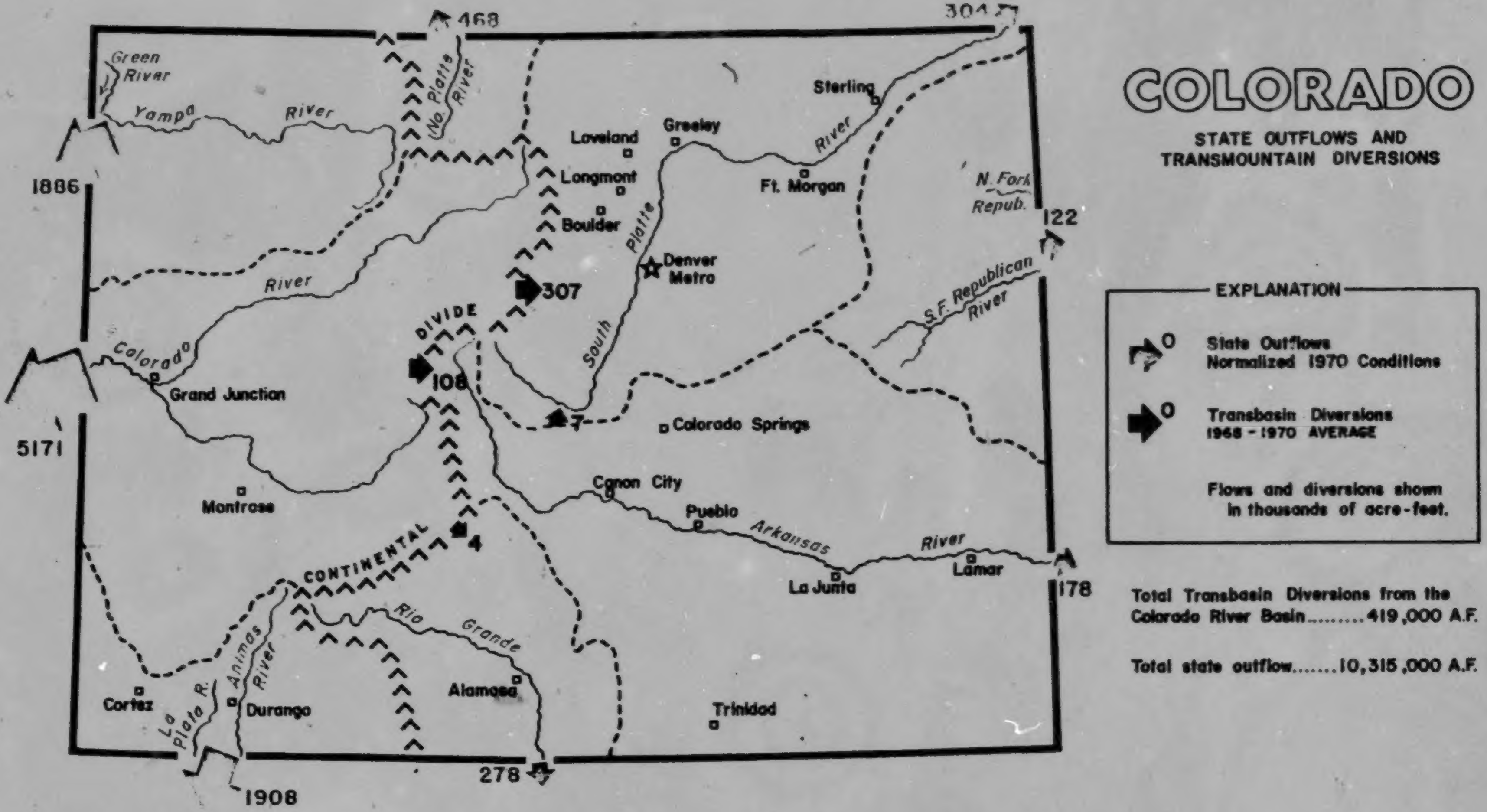

COLORADO
RIO GRANDE
ARKANSAS
MISSOURI
So. Platte R.
LOCATION MAP
COLORADO
GENERAL MAP
RIVER BASIN BOUNDARIES

EXHIBIT 1

WATER FOR TOMORROW: COLORADO STATE WATER PLAN,
Phase 1   Bureau of Reclamation in cooperation
with the State of Colorado   Feb. 1974


COLORADO
STATE OUTFLOWS AND TRANSMOUNTAIN DIVERSIONS
EXPLANATION
State Outflows Normalized 1970 Conditions
Transbasin Diversions 1968 - 1970 AVERAGE
Flows and diversions shown in thousands of acre-feet.
468
304
122
178
278
1908
5171
1886
307
108
7
4
Green River
Yampa River
No. Platte River
Colorado River
Grand Junction
Montrose
Loveland
Longmont
Boulder
Greeley
Denver Metro
South Platte River
Sterling
Ft. Morgan
N. Fork Repub.
S.F. Republican River
DIVIDE
CONTINENTAL
Colorado Springs
Canon City
Pueblo
Arkansas River
La Junta
Lamar
Rio Grande
Alamosa
Trinidad
Cortez
La Plata R.
Animas River
Durango

Total Transbasin Diversions from the Colorado River Basin.........419,000 A.F.

Total state outflow.......10,315,000 A.F.

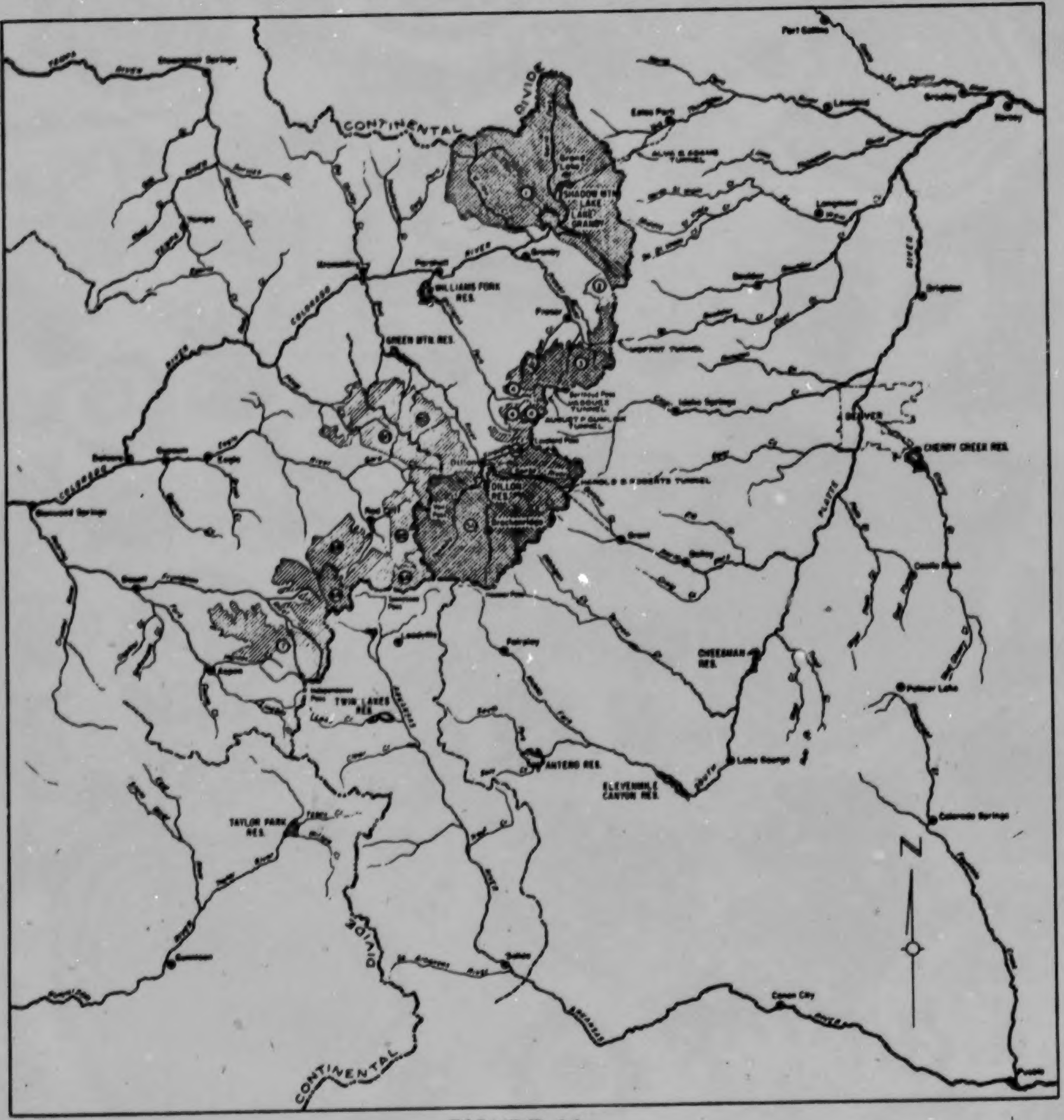

CONTINENTAL DIVIDE
SHADOW MTN. LAKE
LAKE GRANBY
WILLIAMS FORK RES.
GREEN MTN. RES.
DILLON RES.
HAROLD D. ROBERTS TUNNEL
DENVER
CHERRY CREEK RES.
CHEESMAN RES.
TWIN LAKES RES.
ANTERO RES.
ELEVENMILE CANYON RES.
TAYLOR PARK RES.
Fort Collins
Estes Park
Loveland
Longmont
Greeley
Brighton
Eagle
Glenwood Springs
Palmer Lake
Colorado Springs
Canon City
Pueblo
Salida
Gunnison
COLORADO RIVER
ARKANSAS RIVER
PLATTE RIVER
N

FIGURE 14

TRANSMOUNTAIN DIVERSIONS

1975 METROPOLITAN WATER STUDY

PROJECT NO.

① Colorado Big Thompson Federal Project
② Englewood's Ranch Creek Diversion Project
③ Denver's Moffat Tunnel Collection System
④ Denver's Williams Fork Collection System
⑤ Denver's Roberts Tunnel Collection System
Blue River Diversion System
Straight Creek Project
East Gore Range Canal
Eagle-Piney Collection System
⑥ Aurora-Colorado Springs Homestake Project
Eagle-Arkansas Division
Homestake Division
⑦ Fryingpan-Arkansas Federal Project

Scale

LEGEND

▩ Projects Completed and in Operation
▨ Projects Under Development

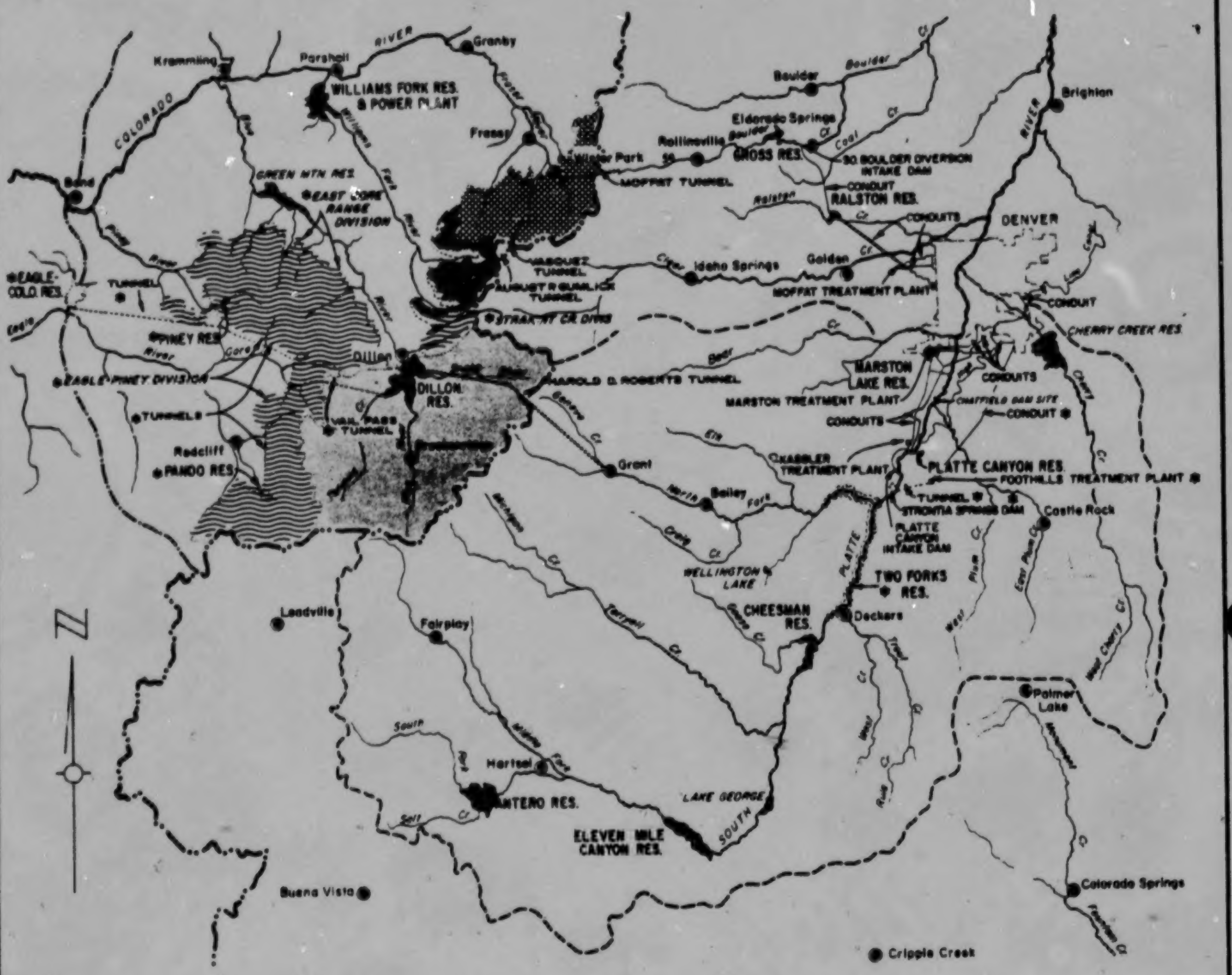
WATER FOR TOMORROW: COLORADO STATE WATER PLAN,
Phase 1, Bureau of Reclamation in cooperation
with the State of Colorado Feb. 1974

Table 3.1--Annual water supplies and depletions

(1,000 acre-feet)

Basin and subbasin	Water supplies				Water depletions[1]				
	Native[2]	Exports[3]	Imports[3]	Available	Irrigation[4]	M&I and rural domestic[5]	Other	Total	Basin outflow
Arkansas River	875	7	101[6]	969	704	58	29	791	178[7]
Colorado River									
Green River	2,013[8]	0	0	2,013	113	2	12	127	1,886
Upper Main Stem	6,738	589[9]	0	6,199	969	14	45[10]	1,028	5,171
San Juan-Colorado	1,987	3	130[9]	2,114	195	3	8	206	1,908[11]
Basin total	10,738	412	0	10,326	1,277	19	65	1,361	8,965
Missouri River									
North Platte River	600	22[12]	0	578	108	1	1	110	468
South Platte River	1,441	0	336[12]	1,777	1,251	164	58	1,473	304
Kansas River	353	0	0	353	220	3	8	231	122[7]
Basin total	2,394	0	314[13]	2,708	1,579	168	67	1,814	894
Rio Grande	1,576[14]	0	4	1,580	617	6	679[15]	1,302	278
State Summary	15,583	419	419	15,583	4,177	251	840	5,268	10,315

1/ Estimated depletions under 1970 conditions of development
2/ Undepleted average annual water supply
3/ 1968 to 1970 annual average
4/ Irrigation consumptive use and associated consumptive reservoir and conveyance losses
5/ Rural domestic, municipal and industrial consumptive uses and related reservoir losses
6/ Includes 7,000 acre-feet exported to South Platte River
7/ 1950 to 1970 annual average
8/ Includes 237,000 acre-feet inflow of Little Snake River from Wyoming
9/ Includes internal basin diversion of 180,000 acre-feet from Dolores River to the San Juan River
10/ Includes 19,000 acre-feet of main stem reservoir evaporation from Curecanti Project
11/ 1914 to 1970 annual average
12/ Includes internal basin diversions of 22,000 acre-feet from North Platte River to the South Platte River
13/ Includes 14,000 acre-feet evaporation attributable to imports from Colorado River
14/ 1924 to 1969 annual average
15/ Includes 658,000 acre-feet nonbeneficial use in Closed Basin


Kremmling
Parshall
RIVER
Granby
WILLIAMS FORK RES. & POWER PLANT
COLORADO
Fraser
Winter Park
Bond
GREEN MTN RES.
EAST GORE RANGE DIVISION
Williams Fork River
EAGLE-COLO. RES.
TUNNEL
Piney River
Eagle
PINEY RES.
Gore
River
Dillon
EAGLE-PINEY DIVISION
DILLON RES.
TUNNELS
VAIL PASS TUNNEL
Redcliff
PANDO RES.
VASQUEZ TUNNEL
AUGUST P. GUMLICK TUNNEL
STRAIGHT CR. DIVS.
HAROLD D. ROBERTS TUNNEL
MOFFAT TUNNEL
Rollinsville
Boulder
Eldorado Springs
GROSS RES.
Coal Cr.
SO. BOULDER DIVERSION INTAKE DAM
CONDUIT
RALSTON RES.
Ralston Cr.
CONDUITS
DENVER
Brighton
RIVER
Idaho Springs
Clear Cr.
Golden
MOFFAT TREATMENT PLANT
CONDUIT
CHERRY CREEK RES.
Bear Cr.
MARSTON LAKE RES.
MARSTON TREATMENT PLANT
CONDUITS
CHATFIELD DAM SITE
CONDUIT
Geneva Cr.
Grant
Elk Cr.
KASSLER TREATMENT PLANT
PLATTE CANYON RES.
FOOTHILLS TREATMENT PLANT
North Fork
Bailey
TUNNEL
STRONTIA SPRINGS DAM
PLATTE CANYON INTAKE DAM
Castle Rock
Craig Cr.
WELLINGTON LAKE
PLATTE
TWO FORKS RES.
Plum Cr.
East Plum Cr.
Cherry Cr.
CHEESMAN RES.
Deckers
Leadville
Fairplay
Tarryall Cr.
West Cr.
Trout Cr.
West Cherry Cr.
Palmer Lake
South
Middle Fork
Hartsel
ANTERO RES.
Salt Cr.
LAKE GEORGE
SOUTH
ELEVEN MILE CANYON RES.
Buena Vista
Cripple Creek
Colorado Springs
Fountain Cr.
N

LEGEND

- CONTINENTAL DIVIDE
- ✱ UNDER DEVELOPMENT
- BOUNDARY SOUTH PLATTE WATERSHED
- BOUNDARY EAGLE-COLORADO COLLECTION SYSTEM WATERSHED (U.D.)

▨ MOFFAT TUNNEL (FRASER RIVER) COLLECTION SYSTEM WATERSHED

☐ ROBERTS TUNNEL COLLECTION SYSTEM WATERSHED

▨ ROBERTS TUNNEL COLLECTION SYSTEM WATERSHED (U.D.)

▨ WILLIAMS FORK COLLECTION SYSTEM WATERSHED

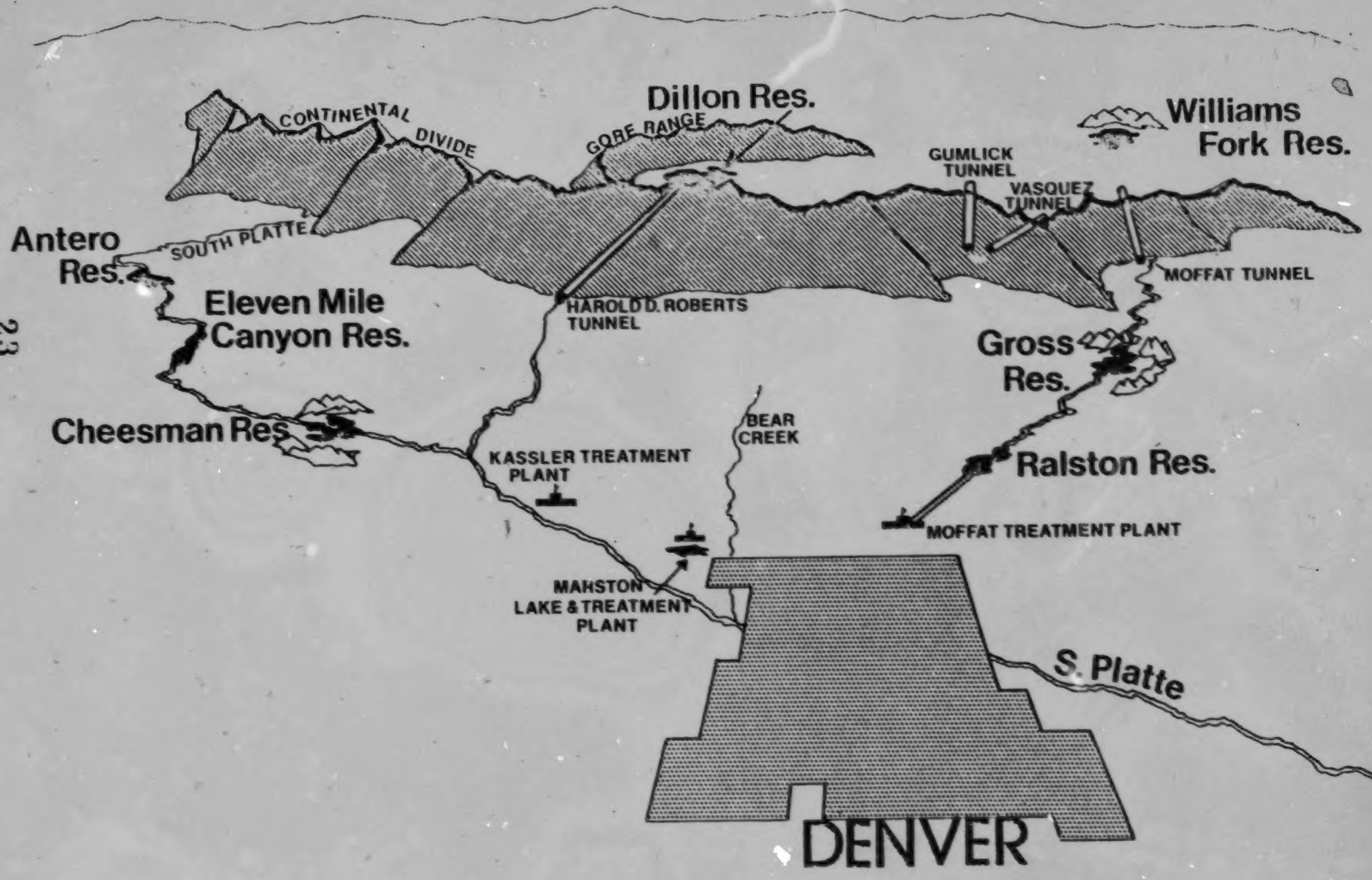
■ WILLIAMS FORK COLLECTION SYSTEM WATERSHED (U.D.)

DENVER BOARD of WATER COMMISSIONERS

WATER SUPPLY SYSTEM

Approximate Scale in Miles

Denver's Water Supply System


CONTINENTAL DIVIDE
Dillon Res.
GORE RANGE
Williams Fork Res.
GUMLICK TUNNEL
VASQUEZ TUNNEL
MOFFAT TUNNEL
Antero Res.
SOUTH PLATTE
Eleven Mile Canyon Res.
HAROLD D. ROBERTS TUNNEL
Gross Res.
Cheesman Res.
BEAR CREEK
KASSLER TREATMENT PLANT
Ralston Res.
MOFFAT TREATMENT PLANT
MAHSTON LAKE & TREATMENT PLANT
S. Platte
DENVER

III. FEDERAL RESERVED WATER RIGHTS

A. Definition - When federal land was withdrawn from the public domain, the U.S. may have also withdrawn waters necessary to effectuate the purposes for which the land was set aside. Whether the U.S. did, in fact, reserve waters is a question of intent which may be implied from the circumstances surrounding the land reservation. Federal reserved water rights generally take a priority date of the date the land was reserved and have been decreed for national forests, Indian reservations and national parks and monuments. Winters v. United States, 174 U.S. 690 (1899); Arizona v. California, 373 U.S. 546 (1963); Cappaert v. United States, (No. 74-1107); Nevada v. United States, (No. 74-1304); ______ U.S. _______ (1976), 96 S. Ct. 2062.

B. Environmental Impact - Reserved water rights may be claimed by the U.S. to serve the purposes of the reservation as it existed at the time it was created, which purposes are derived from the various statutes, executive orders and proclamations by which the reservations were set aside. Numerous environmental values may be enhanced by utilization of reserved water rights - wildlife and fish, aesthetics, minimum stream flows and lake levels, timber and forest protection and improvement.

C. Colorado

1. Jurisdiction - various state interests have successfully battled to have reserved water right claims adjudicated in state water courts. U.S. v. District Court in and for the County of Eagle, 169 Colo. 555, 458 P.2d 760 (1969) and 401 U.S. 527 (1971); U.S. v. District Court in and for Water Division No. 5, 401 U.S. 527 (1971); Colorado River Water Conservation District v. U.S.; Akin v. U.S., ____ U.S. ____ (1976), 47 L. Ed. 2d 483.

2. Adjudication -
    a. In May, 1976, the Master-Referee filed a partial report on the claims of the U.S. in consolidated cases in Water Divisions 4, 5, and 6 and in former Water Districts 36, 37, 51 and 52.
    b. Reserved water rights were found to exist for 7 national forests, Rocky Mountain National Park, Dinosaur, Colorado and Black Canyon of the Gunnison National Monuments, over 1300 springs and water holes, and for two mineral hot springs. Reserved rights for oil shale reservations and for other federal reservations in Colorado have not yet been adjudicated.

c. Environmental impact of the decree is unknown since the U.S. will have several years to quantify its water rights. Additionally, it is expected that the decree will be appealed.

d. Most of the federal uses, especially "environmental" uses will consume de minimus quantities of water. A major impact on both the environment and on other water users may result from the minimum stream flow rights. However, many of the U.S. claims were frustrated by the ruling that minimum stream flows first became a National Forest purpose on June 12, 1960 (date of the Multiple Use Act) and can bear no earlier priority date. Additionally, all national forest reserved water rights are subordinate to the use of water by appropriators for domestic, mining, milling and irrigation uses pursuant to 16 U.S.C. § 481. See, Draft Partial Master-Referee Report Regarding the Claims of the U.S.A., Combined cases in Water Divisions 4, 5, and 6 and former Water Districts 36, 37, 51 and 52.

D. Pupfish case - Cappaert v. U.S.; Nevada v. U.S., ___ U.S. ___ (1976), 96 S. Ct. 2062.

1. The impact of federal reserved rights asserted for "environmental" purposes can be severe. The Supreme Court recently confirmed a reserved water right for the preservation of Devil's Hole Pupfish which inhabit a small underground pool in Devil's Hole National Monument adjacent to Death Valley National Monument.

2. The Court held the implied reservation doctrine to be applicable to ground water withdrawals and upheld an injunction which strictly limited the state decreed rights of an adjacent rancher to operate irrigation pumps. Since the water in the pool and the water pumped by the rancher were hydrologically connected, the U.S. could protect its prior reserved water right. Since there are about 4500 acres above the aquifer involved, the U.S.'s reserved right may preclude significant water withdrawals over a large area.

E. Bibliography

1. Corker, Federal-State Relations in Water Rights Adjudication and Administration, 17 Rocky Mt. Min. L. Inst. 579 (1972).

2. Keichel and Burke, Federal-State Relations in Water Resources Adjudication & Administration; Integration of Reserved Rights with Appropriation Rights, 18 Rocky Mt. Min. L. Inst. 531 (1973).

3. Moses, Federal-State Water Problems, 47 Denver L.J. 194 (1970).

IV. MINIMUM STREAM FLOWS AND LAKE LEVELS

A. Case law has not been receptive to claims to water rights for in-stream uses, i.e., aesthetics or fish preservation. The absence of an actual diversion (i.e., a removal or control of water) has been the flaw in such claims. See, Colorado River Water Conservation District v. Rocky Mountain Power Co., 158 Colo. 331, 406 P.2d 798 (1965); Empire Water & Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913).

B. In 1973, the Colorado General Assembly passed Senate Bill 97 which authorized the state to file for minimum stream flows and lake levels:

> "Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, or acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree. Prior to the initiation of any such appropriation, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain, or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interestate compact." C.R.S. 1973, § 37-92-102(3).

C. Additional legislative changes were made in the statutory definition of "beneficial use" -

> "For the benefit and enjoyment of present and future generations, 'beneficial use' shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows

> between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree." C.R.S. 1973, § 937-92-103(4).

and in "Appropriation" - deleting the requirement of a diversion. C.R.S. 1973, § 37-92-103(3).

D. Minimum stream flow rights are like other appropriative rights and fit within the priority system.

E. The Colorado Supreme Court declined a request from the Governor to opine on the constitutionality of the bill. The possible constitutional infirmities are the legislature's power to delete the requirement of a diversion from the meaning of "appropriation" and the exclusive grant to the state water board to make such filings. Several filings have been opposed but none have yet gone to trial.

F. Some 300 claims have been filed by the Board through the state Attorney General. Filings are made after consultation and study with a variety of conservation agencies.

G. Minimum streams flows were recently upheld in Idaho against a similar constitutional attack. _State Dept. of Parks v. Idaho Dept. of Water Admin._, ____ Idaho ____, 530 P.2d 924 (1974).

H. Minimum stream flows in Colorado also are established by requirements on some federal projects and pursuant to reserved water right claims.

I. The National Water Commission strongly supported minimum stream flows:

> "7-39. Public rights should be secured through State legislation authorizing administrative withdrawal or public reservation of sufficient unappropriated water needed for minimum streamflows in order to maintain scenic values, water quality, fishery resources, and the natural stream environment in those watercourses, or parts thereof, that have primary value for these purposes." _Water Policies for the Future_, Final Report to the President and to the Congress of the United States, 1973, at 279.

J. Controversy has arisen in Colorado about the adverse effect of minimum stream flow rights upon exchange agreements by which various appropriators "trade" and "borrow" water rights to promote efficiency and to maximize their rights. The legislature may consider various amendments to the Water Rights Determination and Administration Act of 1969 to modify minimum stream flow rights.

V. CONDEMNATION OF WATER RIGHTS

A. Colorado Constitution, Art. XVI § 6 states:

> "Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

B. Courts have construed this preference *not* to be an absolute one but only a hierarchy for condemnation - a more preferred user can condemn the water right of a less preferred user upon payment of just compensation. *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233, 48 P. 532 (1896); *Sterling v. Pawnee Ditch*, 42 Colo. 421, 94 P. 339 (1908); *Black v. Taylor*, 128 Colo. 449, 264 P.2d 502 (1953).

C. There are no reported cases of a water rights condemnation. However, on Nov. 14, 1973, the City of Thornton instituted a condemnation action against The Farmers Reservoir and Irrigation Co. The action has been to the Colorado Supreme Court, which held the individual shareholders of a mutual ditch company to be indispensable parties in the action. *Jacobucci v. District Court*, ____ Colo. ____, 541 P.2d 667 (1975). The City of Westminster has also filed a condemnation suit. In addition to the Farmers Co., condemnation actions have been instituted against water shares in the Farmers Highline Canal and Reservoir Co. and the Lower Clear Creek Ditch Co.

D. Environmental Impact

1. Condemnation is normally the last resort in obtaining a water supply. Municipalities have always been able to secure water through marketplace purchases, transmountain diversions, wells, Bureau of Reclamation Projects, leases from major water suppliers such as Denver, and, of course, their own appropriations. The institution of these actions demonstrates the "tightness" of the water supply situation in the Front Range.

2. The continued transfer of water from agricultural use to municipal use, either by market-place sale, or by condemnation, has profound environmental impact. Water is a necessary commodity for urban growth. The loss of water for irrigation often means the abandonment of prime farm lands with their important aesthetic, open-space, green-belt benefits. On the other hand, transfer of Front Range agricultural water to municipal use lessens the demand for additional or increased transmountain and transbasin diversions with their disruptive environmental consequences.

E. Legislative Response

1. Recognizing the land-use impact of water rights condemnations by municpalities, the Colorado legislature enacted H.B. 1555, (1975 Session Laws at 1408). C.R.S. 1973, § 38-6-201, *et seq*. This statute prohibits any condemnations for future needs in excess of 15 years, and establishes a detailed procedure which requires a community growth development plan and sets forth extremely strict standards.

2. H.B. 1555 may face constitutional attack on several grounds such as unlawful interference with the constitutional right to condemn set forth in Art. XVI § 6 (preferences) and Art. XX (home rule) and unlawful delegation of municipal authority to the statutory commission.

3. The 1977 legislature may again consider some restraints on transfers. However, the Constitutional status and property right nature of water rights makes statutory restrictions on transfers difficult.

F. Bibliography

1. Carlson, *Report to Governor John A. Love on Certain Colorado Water Law Problems*, 50 Denver L. J. 293 (1973).

2. Harnsberger, "Eminent Domain and Water Law," 48 *Neb. L. Rev.* 325 (1969) and "Eminent Domain and Water," 4 *Waters and Water Rights*, Ch. 16 (1970).

3. Johnson, "Condemnation of Water Rights," 46 *Texas L. Rev.* 1054 (1968).

4. Trelease, "Preferences to the Use of Water," 27 Rocky Mt. L. Rev. 133 (1955).

5. Gross, "Condemnation of Water Rights for Preferred Uses - A Replacement for Prior Appropriation?" 3 Willamette L. J. 215 (1966).

VI. MISCELLANEOUS WATER RESOURCES ENVIRONMENTAL PROBLEMS

A. Southeastern Colorado Water Conservancy District v. Shelton Farms, Inc.; Southeastern Colorado Water Conservancy District v. Colorado-New Mexico Land Co., __________ Colo. __________ 529 P.2d 1321 (1974).

1. Plaintiff sought a decree for the amount of water "saved" by cutting down phreatophytes (water consuming plants such as cottonwoods). They claimed 442 and 161 acre feet of water per year in the respective cases based on the theory set forth in Pikes Peak v. Kuiper, 169 Colo. 309, 455 P.2d 882 (1969), that new waters not previously part of the stream were "developed waters" and were not junior to prior decrees.

2. The Court held water "saved" by phreatophyte eradication to be "salvaged" water--water which would ordinarily go to waste and is somehow made available for beneficial use. Salvaged waters do not belong to the salvager but belong to the stream and are subject to call by prior appropriators.

3. Although it termed a phreatophyte to be a "water thief" and its "sucking up" of water to be a "waste", the Court did express some environmental concerns:

> "If these decrees were affirmed, the use of a power saw or a bull-dozer would generate a better water right than the earliest ditch on the river. The planting and harvesting of trees to create water rights superior to the oldest decrees on the Arkansas would result in a harvest of pandemonium. Furthermore, one must be concerned that once all plant life disappears, the soil on the banks of the river will slip away, causing irreparable erosion.
>
> We are not unmindful that the statute speaks of the policy of maximum beneficial and integrated use of surface and subsurface water. But efficacious use does not mean uplifting one natural resource to the detriment of another. The waters

> of Colorado belong to the people, but so does the land. There must be a balancing effect, and the elements of water and land must be used in harmony to the maximum feasible use of both." 529 P.2d 1321 at 1327.

The Court then cited the minimum stream flow statute.

4. In partial response to Justice Grove's concurring opinion, the state legislature enacted House Bill 1191, 1975 Session Laws, p. 1397, C.R.S. 1973 § 37-92-103(9) to exclude the salvage of tributary waters by the eradication of phreatophytes from the definition of "plan for augmentation."

B. Protection of Fishing Streams--C.R.S. 1973, §§ 33-5-101.

1. State Policy established to protect and preserve the fishing waters of the state from state agency actions which would change the natural existing state and availability of fishing streams.

2. No state agency shall abstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries by any construction without first notifying the wildlife commission.

3. Notice shall be given not less than 90 days prior to construction and shall detail the proposed plan.

4. If the commission finds an adverse effect on the stream, it shall so notify the agency along with recommendations for alternative construction.

5. If the agency refuses to modify its original plans, the commission may seek arbitration by the governor who shall decide the controversy without judicial review.

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A Panorama of Environmental Laws

AESTHETICS, HISTORICAL PRESERVATION, NOISE, ET AL.

* * * * *

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AESTHETICS, HISTORICAL PRESERVATION, NOISE, ET AL.

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AESTHETICS

I. Zoning.

A. General Rule - a zoning ordinance may not be based on aesthetic considerations alone. Willison v. Cooke. 54 Colo. 320, 329, 130 P. 828 (1913).

B. Minority view - a growing number of recent decisions have upheld zoning regulations based solely or predominantly upon aesthetics. Annot., " Aesthetic Objectives or Considerations as Affecting Validity of Zoning Ordinance." 21 A.L.R. 3d 1222(1968).

C. Aesthetics as an auxiliary consideration - a zoning regulation based in part on aesthetics is not invalid if it may be sustained on other grounds. Anderson, American Law of Zoning, Ch. 7.22 (1968)

D. Colorado.

1. Willison, supra., stated the general rule that aesthetics alone cannot support a zoning ordinance. The pertinent state statutes do not expressly mention aesthetics as a proper subject for regulation thru zoning. CRS '73, 31-23-201 and 203. However, the Local Government Land Use Control Enabling Act, '74 S.L., ch. 81, p. 353, authorizes land use regulation for several purposes closely related to aesthetics and in light of the progress of zoning law since 1913, an aesthetic-based

zoning ordinance might now be sustained.

2. Aesthetic considerations are now validly protected in Colorado thru zoning restrictions on height, standards of design, open land requirements, and lot size minimums.

E. Bibliography.

1. Annot., "Validity and Construction of Zoning Ordinance Regulating Architectural Style or Design of Structure." 41 A.L.R. 3d 1397 (1972).

2. Comment, "Aesthetic Zoning Preservation of Historic Areas," 29 Fordam L. Rev. 729 (1960).

II. Covenants.

A. Restrictive covenants have been an effective means of promoting aesthetics. Particular uses of land, cost of structures, height limitations, posting of billboards, and color and architecture of buildings all may be validly restricted by covenants. Annot., "Validity and Construction of Restrictive Covenant Requiring Consent to Construction on Lot," 40 A.L.R. 864 (1971); and Annot., "Validity and Construction of Restrictive Covenants Controlling Architectural Style of Buildings to be erected on Property," 47 A.L.R. 1232 (1973).

B. Colorado cases.

1. *Burns Realty v. Mack*, 168 Colo. 1, 450 P.2d 75 (1969), (denied use of subdivision lot as an access street to a shopping center because of covenant limiting all lots to residential purposes.)
2. *Rhue v Cheyenne Homes, Inc*. 168 Colo. 6, 449 P. 2d (1969) (prohibited the moving of a 30 yr. old Spanish style house into a subdivision of modern ranch style homes because of a covenant requiring the approval of an architectural control committee which was not obtained.)
3. *W. Alameda Heights Homeowners Assoc. v County Comm*., 169 Colo. 491, 458 P 2d 253 (1969) (Enjoined a shopping center development in a subdivision wherein

covenants allowed only residential uses; change in character of area surrounding a subdivision is not sufficient reason to dissolve the covenants where the subdivision itself has not changed in character.)

4. *Lidke v Martin*, 31 Colo. App. 40, 500 P.2d 1184, (1972) (upheld covenant requiring single family homes despite provision in covenant that incorporated existing zoning regulations which would have permitted multi-family units.)

5. *Rooney v People Bank of Arapahoe County*, 32 Colo. App. 178, 513 P.2d 1077 (1973) (restrictive covenants limiting subdivisions lots to residential use may *not* be enforced by a property owner in an adjacent subdivision, at least in the absence of a showing that both subdivisions were developed as part of a general scheme.)

6. *Snowmass Amer*. *Corp*. *v Schoenneit*, _ Colo. App. _ 524 P.2d 645 (1974) (upheld covenant requiring approval of an architectural control committee if the committee acts under an ordinance which clearly expresses its intent and provides sufficient criteria for judgement and if the committee acts in good faith and in a reasonable manner.)

III. Signs

A. Colorado - Outdoor Advertising Act, CRS'73, 43-1-401 et. seq.

1. Prohibition - no person shall erect or maintain any outdoor advertising device visible from the state highway system unless such device is maintained in accordance with the Act.

2. Exemptions

   a. Official signs.

   b. Advertisements for the sale or lease of property on which the sign is posted.

   c. Advertisements for activities on the land on which the sign is posted.

   d. Signs in areas zoned industrial or commercial.

3. Licenses - no person shall engage in the outdoor advertising business without first obtaining a license from the division of highways. Advertising on one's own premises is exempt. Failure to obtain a license can result in the removal of all one's advertising devices.

4. Permits

   a. As of 1/1/71, no person shall use or maintain any advertising device visible from the state highway system without first obtaining an annual permit.

   b. No permits will be issued for advertising devices not in existence on 1/1/71.

c. A permit requires the applicant to erect and maintain the advertising device in a safe, sound, and good condition, allows not more than two signs per facing, and limits the device to sixty lineal feet in length or less.

d. Noncompliance with permit provisions or abandonment of the device may result in removal of advertising devices.

e. Permits prohibited for several listed activities such as signs in right-of-way sites, attachments to natural objects, and obstructions of the view of traffic.

5. Nonconforming advertising devices - may be continued but provisions made for their eventual removal.

6. Independence Pass - This segment of State Highway 82 declared a scenic highway area in which no advertising device may be erected and those presently existing must be removed by July 1, 1976.

7. Administration - Colorado Division of Highways and state highway commission each have duties and powers under the act and may promulgate rules and regulations.

B. Local - many localities in Colorado, especially larger cities, have sign ordinances. Denver's ordinance is fairly comprehensive and provides for the removal of many signs. However, it has been modified by the courts. See, Art Neon Co v Denver, 488 F. 2d 118 (10th Cir. 1973) and 52 Denver L. J. 113 (1975)

C. Federal Highway Beautification Act of 1965, 23 U.S.C. 131, as amended.

   a. Control of Outdoor Advertising - erection and maintenance of outdoor advertising adjacent to the Interstate and primary systems is to be controlled by the States and Secretary of DOT.

   b. Funds apportioned to a state shall be reduced by 10% if the state fails to provide for effective control of such outdoor advertising. The Colorado Act outlined above reflects the requirements of the federal statute.

   c. Similar provisions control junk yards 23 U.S.C. § 136.

   d. See, Cunningham, "Billboard Control under the Highway Beautification Act of 1965," 71 Mich. L. Rev. 1296 (1973).

IV. Visual Pollution

A. Nuisance - actions have been brought under nuisance or other legal theories to attempt to prevent damage to aesthetically-pleasing places and to stop the development of unusual ugliness. Courts have generally rebuffed such actions because of the subjectivity involved and the countervailing weight of economic freedom. Issue is frequently framed as whether or not the defendent's act unreasonably interfered with the plaintiff's use and enjoyment of his property.

B. Gettysburg Tower - lawsuits by local residents and the state Attorney General attempted to prevent the construction of a huge, commercial tower adjacent to the Gettysburg National Military Park in Pennsylvania as a public nuisance, seriously damaging the dignity of the area, as a cause of mental discomfort to the residents, and as causing immediate and irreparable harm. None of the legal actions were successful but thru administrative pressure by the National Park Service a settlement was reached where the tower would be moved to a less objectionable spot and certain revenues from its operation would be contributed to restoration of the historic Park area.

C. Bibliography

1. Broughton, "Aesthetics and Environmental law: Decisions and Values," 7 Land and Water L. Rev. 451 (1972)
2. Leighty, "Aesthetics as a Legal Basis for Environmental Control, " 17 Wayne L. Rev. 1347 (1971)
3. Noel, "Unaesthetic Sites as Nuisances," 25 Cornell L. Q. 1 (1939)

AESTHETICS

V. The Wilderness Act, 16 USC §1131, et seq.

A. Purpose - to establish a national wilderness preservation system composed of lands from national forests, parks and monuments, wildlife refuges, and game ranges. Fifty-four areas totaling 9.3 million acres were originally designated and the statute provides a procedure for additional designations. On December 19, 1974 Congress passed the Eastern Wilderness Areas Amendment Act which brought sixteen areas in the eastern United States into the system. Nationwide, there are now more than 125 wilderness areas comprised of over 13 million acres.

B. Definition - "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 USC §1131(c)

C. Procedure

1. Federal agency field studies of potential wilderness areas, public hearings and recommendations to the President. A ten year period of agency review terminated on Sept. 4, 1974, but there is still some agency activity.
2. President makes recommendations to Congress.
3. Only Congress can designate wilderness areas. Most of the current activity involves Congressional review of agency and presidential proposals. Both developmental interests and environmental groups lobby intensely on these proposals.

D. Administration

1. Must be managed so as to preserve the wilderness character.
2. Commercial enterprise, roads and motor vehicles are generally prohibited.

3. Although some prospecting may now take place in wilderness areas, after January 1, 1984, the federal mining and mineral leasing statutes will not apply to such areas.

4. Water and utility projects may be established in wilderness areas only by authorization of the President.

E. Colorado Wilderness

1. Five areas designated by the 1964 Act-Mt. Zirkel, West Elk, Rawah, La Garita, and Maroon Bells-Snowmass.

2. Weminuche Wilderness created on January 3, 1975.

3. 681,258 acres (1% of all Colo. land) is designated Wilderness; about 3 million acres are officially recommended or are under study for wilderness, including controversial Flat Tops and Eagles Nest proposals.

4. National Park Service has made recommendations for Wilderness designations in Black Canyon of the Gunnison N.M., Colorado N.M., Great Sand Dunes, N.M., Dinosaur N.M., Mesa Verde N.P., and Rocky Mountain N.P.

F. Bibliography:

1. Parker v. United States, 309 F.Supp. 594 (D.C. Colo. 1970), aff'd. 448 F.2d 793 (10th Cir., 1971), cert. den. 405 US 989 (1972) (Citizens may enjoin the Forest Service from disturbing lands which are proper for study under the Wilderness Act until Congress and the President have acted upon the Secretary of Agriculture's wilderness recommendations for the area).

2. Henning, The Ecology of the Political/Administrative Process for Wilderness Classification, 11 Nat. Res. J. 69 (1971)

3. McClosky, The Wilderness Act of 1964: Its Background and Meaning, 45 Ore. L. Rev. 288 (1966).

4. Wilderness Workshop of Colorado Open Space Council
1325 Delaware St., Denver 80204.

AESTHETICS

VI. Junkyards Adjacent to Highways, C.R.S. '73, 43-01-501, et seq.

A. No visible junkyard may be established or maintained within 1000 feet of a federal-aid primary or interstate highway without a permit from the state department of highways, unless the area is industrially zoned.

B. Permits shall be issued only to screened junkyards.

C. The Highway Department shall screen all such junkyards in existence on February 11, 1966.

D. Local zoning generally regulates junkyards. eg. Board of County Comm'rs. v Thompson, 177 Colo. 277, 493 P.2d 1358 (1972).

VII. Colorado Underground Conversion of Utilities Act,

C.R.S. '73, 29-8-101, et seq.

A. Local Improvement Districts - authorizes the establishment of such districts and the assessment of real property therein for the underground conversion of overhead facilities (electric or communication).

B. Status - few districts have been formed probably because of the great costs involved in such conversions. Many local zoning ordinances now require initial installation of underground facilities.

C. Lyman v Town of Bow Mar, _____ Colo. _______, 533 P.2d 1129 (1975) - The creation of such a district in the Denver suburban area of Bow Mar was upheld and the constitutionality of the Act sustained.

D. Bibliography - see generally, Buchman, "Electric Transmission Lines and the Environment," 21 Cleveland St. L. Rev. 121 (1972).

AESTHETICS

VIII. Minimum Stream Flows and Lake Levels.

A. Colorado Water Conservation Board is empowered to appropriate water "to preserve the natural environment to a reasonable degree," C.R.S. '73, 37-92-101(3), which purpose is now defined as a beneficial use. C.R.S. '73, 37-92-103(4).

B. The CWCB has obtained several decrees and has filed for others to maintain stream levels.

C. Such rights are like all other appropriative rights and will not injure senior rights.

D. The constitutionality of this 1973 legislation has been questioned and minimum stream flow issues (lack of a physical diversion and the exclusive power of the CWCB) are now in state water court. See generally, *State Dept. of Parks v Idaho Dept. of Water Admin.*, _____Idaho_________, 530 P.2d 924 (1974) (upholding minimum stream flow rights in Idaho).

IX. Federal Reserved Water Right Claims

A. The United States has filed for minimum stream flows and lake levels under the reserved right theory that when federal lands were withdrawn from the public domain, waters necessary to effectuate the purposes of the lands were also withdrawn. These claims are based upon esthetic, recreation and wildlife purposes.

B. The federal reserved water right claims have been opposed and are awaiting decision by various state water courts. See generally, Kiechel and Burke, "Federal-State Relations in Water Resources Adjudication and Administration; Integration of Reserved Rights with Appropriative Rights," 18 *Rocky Mt. Min. L. Inst.* 531 (1973).

AESTHETICS

X. Wild and Scenic Rivers Act of 1968, 16 USC §1271, et seq.

- A. Purpose - to preserve rivers or segments thereof in their natural state and to protect such waters and their immediate environs from dams and construction projects. The Act placed 8 river areas in the system, required the study of 27 others and established a procedure for future additions.
- B. Classification
    1. Wild - free of impoundments, generally inaccesible except by trail, essentially primitive shoreline, and unpolluted waters.
    2. Scenic - free of impoundments, largely primitive and undeveloped shorelines, and accessible in places by roads.
    3. Recreational - readily accessible, may have some shoreline development and may have undergone some diversions or impoundments in the past.
    4. Adjacent lands - immediate environment of the above three classes must possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or similar values." Boundaries of each area are established by the administrating agency.
- C. Designation
    1. By Congress
    2. By state legislation, application by the governor and approval of the Secretary of the Interior.
- D. Administration
    1. Each component is administered in accordance with its classification.

2. Federal areas are managed by the Secretary of the Interior or the Secretary of Agriculture (if the river area is mostly within a national forest).

3. State-designated areas are administered by the state at its own expense.

4. FPC may not license any project works on or directly affecting a designated river.

5. No federal agency shall assist any project by loan, grant, license or otherwise that would have a direct and adverse effect on the values for which the river was designated.

6. Easements and rights of way may be granted if consistent with the policy of the act.

7. Federal mining and mineral leasing laws are applicable but mining operations may be regulated to effectuate the purposes of the act. Mining claims affecting lands within an area must be limited to surface mineral resources.

8. State hunting and fishing laws are not affected.

E. Colorado

1. Colorado has no rivers or river areas in the national system.

2. The following river segments in Colorado have been introduced in Congress for inclusion:

    a) Big Thompson, Colorado: The segment from its source to the boundary of Rocky Mountain National Park.

    b) Cache la Poudre, Colorado: Both forks from their sources to their confluence, thence the Cache la Poudre to the eastern boundary of Roosevelt National Forest.

    c) Colorado, Colorado and Utah: The segment from its confluence with the Dolores River, Utah, upstream to a point 19.5 miles from the Utah-Colorado border in Colorado.

d) Conejos, Colorado: The three forks from their sources to their confluence, thence the Conejos to its first junction with State Highway 17, excluding Platoro Reservoir.

e) Elk, Colorado: The segment from its source to Clark.

f) Encampment, Colorado: The Main Fork and West Fork to their confluence, thence the Encampment to the Colorado-Wyoming border, including the tributaries and headwaters.

g) Green, Colorado: The entire segment within the State of Colorado.

h) Gunnison, Colorado: The segment from the upstream (southern) boundary of the Black Canyon of the Gunnison National Monument to its confluence with the North Fork.

i) Los Pinos, Colorado: The segment from its source, including the tributaries and headwaters within the San Juan Primitive Area, to the northern boundary of the Granite Peak Ranch.

j) Piedra, Colorado: The Middle Fork and East Fork from their sources to their confluence, thence the Piedra to its junction with Colorado Highway 160, including the tributaries and headwaters on national forest lands.

k) Yampa, Colorado: The segment within the boundaries of the Dinosaur National Monument.

l) Dolores, Colorado: The segment of the main stem from Rico upstream to its source, including its headwaters; the West Dolores from its source, including its headwaters, downstream to its confluence with the main stem; and the segment from the west boundary, section 2, township 38 north, range 16 west, NMPM, below the proposed McPhee Dam, downstream to the Colorado-Utah border, excluding the segment from one mile above Highway 90 to the confluence of the San Miguel River.

F. Bibliography

1. Tarlock, "Preservation of Scenic Rivers", 55 *Ky L.J.* 745 (1968).

2. Tarlock and Tippy, "The Wild and Scenic Rivers Act of 1968" 55 Cornell L. Rev. 707 (1970).

AESTHETICS

XI National Trails System Act, 16 USC §1241, et seq.

A. Purpose - to establish a national system of recreational and scenic paths for access to and enjoyment of the outdoors. The Act designated the Appalachian Trail and the Pacific Crest trail as initial components, required the study of others, and provided a procedure for additions.

B. Classification

1. Recreation - to provide a variety of outdoor recreation uses in or reasonably accessible to urban areas.
2. Scenic - for the conservation and enjoyment of nationally significant scenic, historical, natural or cultural qualities.
3. Connecting or side trails - points of access or connection.

C. Designation

1. Secretary of Interior and Secretary of Agriculture may designate recreational trails with the consent of the federal agency, or state or political subdivision having jurisdiction over the lands involved. About forty-eight trails have been so designated.
2. Only Congress can designate scenic trails.
3. Federal agencies and programs shall encourage the establishment of trails by states, local governments and private interests.

D. Administration

1. Appropriate secretary may issue regulations for use.
2. Motor vehicles prohibited on scenic trail.

3. Federal agencies may enter into cooperative agreements, acquire or condemn lands or interests therein, and grant easements and right of ways in regard to the national trails system.

E. Colorado

1. Colorado has no trails in the national system.
2. Three trails through Colorado were listed in the Act for study and potential designation:
   - a) Continental Divide Trail
   - b) Sante Fe Trail
   - c) Mormon Battalion Trail
3. State trails have been discussed for along the front range and from Denver to Durango.

HISTORIC PRESERVATION

I. Colorado Law

A. Historical, Prehistorical and Archeological Resources - C.R.S. '73, 24-80-401, et seq.

1. Colorado reserves title to all historical, prehistorical, and archeological resources in all areas (lands, rivers, et al.) owned by the state or by any of its political subdivision, and reserves right-of-way access.
2. Creates office of state archeologist who, in conjunction with the State Historical Society, administers the act.
3. Permits - Society shall issue permits for investigation and excavation of resources. The permit requires annual progress reports, inventory, and the right of the state to a representative collection.
4. Society may make agreements for the exercise of its powers on nonstate-owned land.
5. Penalties - Knowing and willful disturbance of resources without permit is a misdemeanor with a fine up to $500. and jail up to 30 days. Articles and money derived from the illegal sale or trade of resources shall be forfeited to the society.
6. Society may obtain injunction to stop unlawful disturbance.
7. Governor may establish state monuments on state-owned parcels of land.

B. Historical Monuments - C.R.S. '73 24-80-501, et seq.

1. Historical sites acquired by the State Historical Society are state historical monuments.

2. State Historical Society shall survey and study sites and structures for a long-term historical preservation program and the society may acquire such.

C. GHOST TOWNS

1. State Historical Society may designate any appropriate area a ghost town unless private or public owner objects.

2. No person shall damage, destroy or take anything from a designated ghost town except by permission of the property owner. Violation is misdemeanor; fine - up to $2,000. and jail - up to 6 months, or both.

D. Conservation Trust Funds

1. Establish state conservation trust fund to be funded annually by appropriation by the state legislature. Each county's share equals the percentage its population bears to the state's population, and within each county each municipality's share equals the percentage its population bears to the county population.

2. Local government must put the money in a conservation trust fund and to be expended only for the acquisition and development of new conservation sites.

3. "New conservation sites" means "interests in land and water, acquired after establishment of a conservation trust fund pursuant to this section, for park or recreation purposes, for all types of open space including but not limited to floodplains, greenbelts, agricultural lands, or scenic areas, or for any scientific, historic, scenic, recreational, aesthetic, or similar purpose."

E. Historical considerations in land use legislation.

1. H.B. 1041 - '74 S.L. Ch. 80, p. 335, et seq.

"...local government may designate...c) Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance as areas of state interest."

2. 106-7-202(3) "Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance, as determined by the state historical society, the department of natural resources, and the appropriate local government, shall be administered by the appropriate state agency in conjunction with the appropriate local government in a manner that will allow man to function in harmony with, rather than be destructive to, these resources.... Development in areas containing historical, archaeological, or natural resources shall be conducted in a manner which will minimize damage to those resources for future use."

   Designation as an area of state interest triggers the provision requiring a permit for development in that area. 106-7-501.

3. Local Government. Land Use Control Enabling Act of '74 ('74 S.L., Ch. 81 p. 353-355).

   Local government granted the authority to plan for and adopt land use regulations for land with historical or archaeological importance.

II. Federal

   A. The Antiquities Act of 1906, 15 U.S.C. §431 et seq.(1970)

      1. National monuments - granted the president discretionary powers to declare historic and prehistoric structures, landmarks and other objects of historic or scientific interest on federal land as national

monuments. Secretary of Interior may accept private sites for designation. There are now 82 National Monuments, including the Great Sand Dunes, Dinosaur, Colorado, Black Canyon of the Gunnison, and Florissant Fossil Beds National Monuments in Colorado.

2. Permits - any exploration affecting the objects protected by the National Monument must be authorized by permit from the departmental secretary having jurisdiction over the land. The Smithsonian Institute receives the application and makes a recommendation of approval or denial. Only scientific and educational exploration is permitted and site preservation and permanent display of objects discovered are encouraged.

3. Penalties - any person "who shall appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity" without permission of the Secretary commits a misdemeanor punishable by fine of not more than $500 and imprisonment for not more than 90 days, or both. This prohibition and penalty now apply to historical objects on federal property which has not been designated as a national monument.

B. The Historic Sites Act of 1935, 16 U.S.C. §461 et seq. (1970)

1. Policy - preservation for public use of historic sites and objects of national significance.

2. Administration

   a) Secretary of Interior - acting through the National Park Service shall locate and rehabilitate sites, acquire property by condemnation and otherwise, provide educational displays, supervise research and contract with others concerning the maintenance and operation of historic sites. Act grants the Secretary broad discretion in selecting and operating sites.

b) Advisory Board of National Parks, Historic Sites, Buildings and Monuments - established to obtain citizen-expert input.

c) Registry of National Historic Landmarks - properties identified by the National Survey of Historic Sites and Buildings which commenced in 1937 are eligible for inclusion as a landmark for exceptional value. Landmark status often is integral to statutory protection and would be of assistance in non-statutory preservation suits. Under the 1935 Act private property may be included in the Registry if its owner agrees to preserve it, allow periodic inspection and use it in a manner consistant with its historical importance. The only recourse for violation of this agreement is removal of the landmark designation. Financial aid is available to individuals, organizations and state and local governments for landmark preservation.

C. The Reservoir Salvage Act of 1960, 16 U.S.C. §469 (1970)

1. Policy - to preserve historical and archaeological data and objects which might be damaged or destroyed by water resource development (similar protection offered previous to highway construction; 23 U.S.C. §305 (1970))

2. Requirement

   a) Prior to any construction of a dam by a federal agency or federal licensee, the Secretary of the Interior shall be notified so that a historical survey of the area to be flooded can be undertaken.

   b) Only significant sites will be acted upon by the Secretary and data and objects recovered shall become government property.

D. The National Historic Preservation Act of 1966, 16 U.S.C. §470 et seq (1970), as amended, 16 USCA §470 (Supp. 1973).

1. National Register

   a) State Liason officer develops a statewide historic preservation plan, including designation of historic sites and nominations to the Secretary of the Interior.

   b) The Secretary reviews the nomination to see if criteria are met and, if so, enters the nomination in the REgister.

   c) Scope

      i) Places - buildings, objects, districts, structures and sites. This is a comprehensive Register and allows inclusion of geographic areas such as Cripple Creek, Georgetown-Silver Plume, and Curtis-Champa Street districts.

      ii) Criteria - importance in American history, architecture, archeology, or culture and an association with important events, significant persons, distinctive construction (or high artistic value), or historical information.

d) Effect of inclusion

i) Any federal or federally assisted undertaking or federally licensed project shall first take into account the effect of the undertaking on any entities included in the Register. The Advisory Council on Historic Preservation (council of government officials and presidentially-appointed citizens) must be given the opportunity to comment and reasonable alternatives must be considered. See, Thompson v Fugate, 347 F.Supp. 120 (E.D. Va. 1972); Ely v Velde, 451 F.2d 1130 (4th Cir. 1971).

ii) Consent of the owner is not required and he is free to take whatever action he wishes in regard to the registered object. The only restrictions go to federal action.

2. Federal assistance - the Act provides for both technical and financial assistance to states for historic survey and preservation work.

E. National Environmental Policy Act of 1969, 42 U.S.S. §4321 et seq (1970) - NEPA specifically enunciates a policy of preserving important historical and cultural aspects of the American heritage, and provides some protection for historical properties not included in the National Register.

F. Executive Order No. 11,593, 36 CFR 8921 (1971)

1. Orders all federal agencies to provide leadership in preserving, restoring and maintaining historic and cultural resources.

2. Federal agencies must locate, inventory and

nominate for inclusion to the National Register eligible historic properties under their jurisdiction.

3. Federal agencies must institute plans to contribute to historic preservation and enhancement.

III. Bibliography

A. Baldwin, "Historic Preservation in the Context of Environmental Law," 36 *Law & Comtemp. Prob.* 432 (1971).

B. Fowler, "Protection of the Cultural Environment in Federal Law," *Federal Environmental Law*, Environmental Law Institute, pp. 1466-1517 (1974).

C. Wilson and Zing, "What is America's Heritage," 22 *Kan. Law Rev.* 413 (1974).

D. Yannacone, et al., *Environmental Rights and Remedies*, Ch. 2.9 (1974)
(detailed study of Florissant Fossil Beds case).

NOISE

I. Colorado

A. Noise Abatement Act, C.R.S. '73, 25-12-101 et seq.

1. Noise Zones - Sound levels of noise from sources to which the law is applicable and which radiate from a property line at a distance of 25 ft. or more therefrom in excess of the db(A) established for the following time periods and zones shall constitute prima facie evidence that such noise is a public nuisance:

Zone	7:00 a.m. to next 7:00 p.m.	7:00 p.m. to next 7:00 a.m.
Residential	55 db(A)	50 db(A)
Commercial	60 db(A)	55 db(A)
Light Industrial	70 db(A)	65 db(A)
Industrial	80 db(A)	75 db(A)

a) A decibel is a unit used to express the magnitude of a change in sound level. Each additional decibel represents a 10-fold increase in volume.

b) The term db(A) is a measurement which simulates human hearing. Normal speech is generally measured at 60 db(A), a whisper at 20 db(A), rock music in a discotheque at 120 db(A), and an air raid siren at 140 db(A). Sound may begin to cause physical distress between 130-160 db(A).

c) Measurement must be made when the wind velocity is not more than 5 M.P.H., and consideration must be given to encompassing noise from the environment.

d) The above-listed levels may be increased by 10 db(A) between 7:00 a.m. and 7:00 p.m. for a period not to exceed 15 mins. in any one-hour period.

e) Periodic, impulsive, or shrill voices shall be considered a public nuisance when such noise levels are 5 db(A) less than those above-listed.

f) Railroad and construction activities are permitted industrial zone levels in most circumstances.

2. Noise restrictions for new, off-road vehicles -
   a) Maximum db(A) listed for various vehicles
   b) No person may sell or offer to sell new vehicles exceeding the maximum
   c) Violations are misdemeanors with fines of not less than $50 nor more than $300.
3. Enforcement
   a) Equitable actions - any resident may bring an action to abate the public nuisance.
      i) Court may stay an order to give the defendant time to comply with the statute.
      ii) Violations of court orders shall be punished as contempt by fines of not less than $100., nor more than $2,000. Each day in violation equals a separate offense.
   b) Local authorities
      i) Motor vehicles - may adopt noise restrictions within specified limits.
      ii) May adopt other standards which are no less restrictive than the provisions of the state law.
   c) Few, if any, actions have been brought under the state law, apparently because of difficulties in obtaining acoustical experts to make the necessary measurements and the cost involved.

B. Local

1. Denver, Boulder (one of the oldest noise ordinances in America), Englewood, Colorado Springs, Arvada, Littleton and Lakewood have adopted noise ordinances.

2. Denver's ordinance is comprehensive and regulates both motor vehicles and stationary sources such as construction activity.

   a) Generally, warnings are issued and plans of compliance are sought.

   b) Both noise levels and hours are regulated.

   c) Enforcement and administration is divided between the police department and the health and hospitals department.

   d) About six cases have been filed in County Court since the ordinance's adoption in June, 1974.

C. Federal

1. Background

   a) The Clean Air Amendments of 1970 established the Office of Noise Abatement and Control within the EPA to study and report on the problem of noise.

   b) Following the submission of the EPA's report, the Noise Control Act of 1972 was enacted.

   c) A few noise control provisions have been enacted in specific areas, i.e. Federal Aviation Act Amendments of 1968, 49 USC §1431 (1970).

2. The Noise Control Act of 1972, 42 USC §4901 et seq. (and related statutes and regulations)

   a) Aircraft noise

      i) FAA is still primarily responsible for noise control and has issued numerous regulations.

ii) EPA directed to study and report on aircraft noise.

iii) EPA shall make noise control proposals to the FAA.

iv) Burbank v Lockheed Air Terminal Inc. 411 U.S. 624 (1973) found a general federal preemption of the regulation of aircraft noise.

b) Surface transportation

i) EPA regulations for railroads and motor carriers (trucks and buses) engaged in interstate commerce. 38 Fed.Reg. 144 (1973) Regulatory power goes to both equipment and operations.

ii) Federal Highway Administration has issued standards and procedures to be used in the planning and design of highways. 39 Fed. Reg. 129 (1974); 23 USC §109(i)(1970).

c) Product Noise

i) EPA will regulate the noise emission characteristics of products in interstate commerce which are major noise sources (including engines, construction equipment, transportation equipment and electrical devices).

ii) EPA's responsibility goes to both standards of noise levels and to labeling as to the noise generating and noise reducing characteristics of products.

a) Manufacturers must make warranty that product complies with the applicable standard.

b) EPA may certify that a product is a "low-noise emission" one and such products receive preferences in federal purchasing.

d) General

i) Intent of the Act and the pertinent regulations go to maximum noise levels and to noise level reduction.

ii) Criminal penalties

a) Each day of violation can be punished by maximum imprisonment of one year or a fine of $25,000, or both.

b) Once convicted, subsequent penalties can be a maximum imprisonment of two years and a $50,000 fine, or both.

c) Tampering with monitoring devices or false statements can be punished by 6 months imprisonment or a $10,000 fine, or both.

iii) Citizen Suits

a) Citizens may bring suits against violators of the Act or against the EPA for its failure to perform a duty under the Act.

b) A citizen suit is precluded if the EPA has brought an action against the alleged violator.

iv) EPA enforcement - fairly broad enforcement powers including authority to subpoena and to take information to enable it to carry out the act, and to issue orders necessary to protect the public health and welfare under the act.

3. Miscellany

a) The Dept. of Housing and Urban Development (HUD) has adopted noise policies applicable to its programs. HUD will not assist construction on sites exposed to unacceptable levels of noise or projects which fail to minimize interior noise exposure. 37 Fed. Reg. 22673, 22675 (1972); and HUD, Circular 1390.2 Noise Abatement and Control: Departmental Policy, Implementation, Responsibilities, and Standards (8/4/71).

b) The General Services Administration's Public Building Services will consider noise impacts in selecting sites, designs and construction of federal facilities. Additionally, GSA is authorized to pay a premium for EPA certified low-noise emission products. EPA, Summary of Noise Programs in the Federal Government (12/31/71).

c) Noise standards are in effect under the Occupational Safety and Health Act of 1970 (OSHA), 29 USC §651, et seq. (1970). These standards set maximum duration periods for sound exposures of 90 db(A) and above for all employees in businesses affecting interstate commerce. 41 C.F.R. §50-204.10 (1970). Employers must use controls or provide protective equipment for employees.

D. Legal Actions

a) Nuisance

i) Public nuisance - may be brought pursuant to the Colorado statute. 25-12-104.

ii) Before the adoption of the state noise abatement law, nuisance actions based on noise have been successful. See, Krebs v Hermann, 90 Colo. 61, 6 P.2d 907 (1931). (The maintenance of a kennel of 40-90 barking dogs may be enjoined as a private nuisance); See also, Lavelle v Julesburg, 49 Colo. 290, 112 P. 774 (1910) (Adjacent landowner may not receive damages for noise, smoke and vapors from a power plant since they are inconveniences suffered by the general public).

b) Inverse Condemnation

   i) Action may be brought against governmental entities on a constitutional theory of a "taking" of property by virtue of excessive noise invasion.

   ii) Such a "taking" has been found in airplane noise cases.

      a) United States v Causby, 328 US 256 (1946)

      b) Griggs v Allegheny, 369 US 84 (1962)

      c) Aaron v Los Angeles, 1 ELR 20196 (Cal.Supr. Ct. Feb. 5, 1970)(a "taking" under a state constitutional provision)

      d) See Baxter and Altree, "Legal Aspects of Aircraft Noise," 15 J. Law and Economics (1972)

c) Negligence

   i) A tort action may exist for physical harm caused by an unreasonable act of another person in creating noise.

   ii) Actions for annoyance or for psychological injury have been suggested. Yannacone, et al., Environmental Rights and Remedies, (1972) (see 1974 Supplement).

5. Bibliography

a) Lake, "Noise: Emerging Federal Control." Federal Environmental Law, Environmental Law Institute, pp 1150-1231, 1974.

b) Yannacone, et al., Environmental Rights and Remedies, Ch. 11 (Noise) (1972) (See 1974 Supplement for good discussion of the measurement and characteristics of sound for use in legal actions concerning noise).

c) "Noise from the operation of an industrial plant as nuisance." 23 ALR 1407, supp. 90 ALR 1207.

ODOR POLLUTION

I. Introduction - odor pollution is generally considered within the subject of air pollution. Thus, the law of air pollution should be consulted by an attorney confronted with an odor pollution problem.

II. Colorado.

A. Odor is considered an "air contaminant" under the Air Pollution Control Act of 1970, CRS '73, 25-7-101 et seq. Odors are primarily caused by minute quantities of gas released into the air.

B. The Air Pollution Control Commission has issued Odor Emission Regulations (Regulation No. 2, adopted 3/11/71) pursuant to statutory authorization to regulate odors. CRS '73, 25-7-108(2)(e).

1. Prohibition - no person shall cause the emission of odorous air contaminants from any single source so as to result in detectable odors in excess of certain limits.

a. Residential or commercial - it is a violation if odors are detected after the odorous air has been diluted with 7 or more volumnes of odor-free air.

b. All other areas - it is a violation if odors are detected after dilution by 15 or more volumnes of odor-free air.

c. Manufacturing and agriculture odors shall not be considered violations if the best practical control available is utilized (so long as it is reasonable). However, a violation may still be found if there is a detectable odor after dilution with 127 or more volumnes of odor-free air.

2. Measurement.

   a. Two odor measurements shall be taken at least 15 minutes apart but within 1 hour and shall be from outside of the property from which the odor originates.

   b. Measurements must be taken by selected personnel schooled by the Colo. Dept. of Health in odor evaluation.

   c. Evaluation may be made by use of the Barneby-Cheney Scentometer which is an accessory attachment for the human olfactory system (like a gas mask) which enables the nose to determine a mathematical relationship between the intensity of the stimulus and that of the sensation produced. In effect, it is the equivalent of the Ringlemann Chart used to measure the air pollution of visual plumes.

III. Federal - there has been little substantive federal activity directly concerning odor pollution except as it relates to other air pollution control efforts.

IV. Nuisance.

A. Nuisance suits have successfully enjoined noxious smells or recovered damages for such. Krebs v. Hermann, 90 Colo. 61, 6 P.2d 907 (1931), (odor from dog excreta and frequent loud barking constitute a nuisance).

B. Each situation will be considered by the court in regard to the specific facts and circumstances. The character of the neighborhood has been a determinative factor; city dwellers normally have no cause of action against odors necessarily incident to an urban environment,

V. References

A. Yannacone, et al., Environmental Rights and Remedies, Vol. 1, Ch. 4.6 (1972).

B. 61 Am. Jur. 2d Pollution Control §51.

PESTICIDES

I. COLORADO

  A. Pesticide Control Act. CRS '73, 35-4-101 et seq.

    1. "Pests" means insect pests and animal pests except rodents, jackrabbits, and predatory animals and includes fungus or other plant diseases and weeds.

    2. Administration

      a. State Dept. of Agricultural shall administer and enforce the act.

      b. County pest inspectors, examined and licensed by the state, provide most of the field administration of the act.

    3. Inspections and treatment

      a. Farm and other property may be inspected for pests and if found and determined to be of potential injury to others they shall be destroyed by the owner or the inspector at the owner's cost not to exceed $250.

      b. Board of County Commissions may authorize spraying, disinfection, or other treatment for pest control on private property with eventually billing to the property owner.

      c. The dept. shall devise pest control means.

    4. Pest-ridden material

      a. Dept. may isolate or destroy any plant material shipped in or into Colorado which carries or is deemed liable to carry pests.

        - b. Owner shall abate such pests or the material will be destroyed without recompense.
    5. Quarantines.
        - a. Dept. may quarantine any portion of the state affected with serious pests when products, animals or objects would be libel to spread the pests to other areas. No carrier of pests may be transferred from a quarantined area.
        - b. Quarantines may be imposed against the importation of pest carriers into Colorado.
    6. Emergencies - Dept. may make inspections and charge the owner the cost thereof.
    7. Federal Agreements - Dept. may enter into agreements with any agency of the federal government and may delegate its authority to representatives thereof.
    8. Prohibition - No person shall knowingly transport live pests in or into Colorado, except for scientific purposes, without permission of the Dept.
    9. Penalities
        - a. Violations of this act or of orders given thereunder shall be for each day of the offense and shall be punishable by a fine of $25-500.
        - b. The abuse or misuse of any certificate, permit or appointment shall be cause for the revocation of such instrument.

B. Pest Control Districts, CRS '73, 35-5-101.
    1. Creation.
        - a. 25% of the resident landowners within a continuous territory may petition the board of county

commissioners to form a district.

.b. County commissioners shall conduct an election of all landowners in the proposed district and if 66 2/3 of those voting favor the district and the landowners voting own 50% of the land in the proposed district, it shall be established.

2. Administration

    a. State commissioner of agriculture shall designate the pest control methods to be used in Colorado.

    b. County pest inspectors shall cooperate with the state commissioner in locating and eradicating pests.

    c. Landowners within a district must control pests pursuant to orders of the commission or must pay the costs of the inspector's control or eradication operation.

    d. A tax levy not to exceed two mills in any one year may be assersed for pest control in a district of the county.

    e. The commissioner shall control pests on state public lands.

3. Public nuisance

    a. All noxious weeks, insect pests, or plant diseases with respect to which a control district has been created, are declared to be a public nuisance.

b. Inspectors under the direction of the commissioner and with the approval of the county commissioners may remove and destroy or take other appropriate action necessary for pest control. The general law relating to the prevention and abatement of nuisances shall also apply.

C. Pest and Plant Quarantine Act, CRS '73, 35-6-101 et. seq.

1. Dept. of Agriculture may take whatever quarantine, control, or eradication measures as may be necessary to prevent the introduction or migration of pests or their carriers or hosts that may be destructive to the agricultural industries of Colorado.

2. Violations of orders issued pursuant to the act are misdemeanors punishable by fines of $10-20 for each day of the offense.

D. Pesticide Act, CRS '73, 35-9-101 et. seq. (Similar to FIFRA; *see* Section II, p. 44, *infra*.)

1. "Pesticide" means any substance intended for preventing, destroying , repelling or mitigating any insects, rodents, nematodes, fungi, weeds, or other forms of plant or animal life or viruses, except viruses on or in man or other animals, which the dept. of agriculture declares to be a pest; and any substance intended for use as a plant regulator, defoliant, or desiccant.

2. Prohibitions,

   a. Sales or transportation of an unregistered pesticide, a pesticide differing in content from registration representation, a pesticide not in the registrant's or manufacturer's unbroken immediate container having a proper lable, an improperly labeled or highly toxic pesticide, arsenates without required labels, and any pesticide which is adulterated or misbranded.

   b. Labeling - No person shall detach or alter any required label; falsely or misleadingly advertise or use for his own advantage or improperly reveal pesticide formula.

   c. Handling and disposal - No person shall handle, store, or distribute any pesticides in such a manner as to endanger human life, and disposal of pesticides shall additionally not cause injury to crops or wildlife or pollute any water.

3. Registration,

   a. Manufacturers, wholesalers and jobbers must register every pesticide distributed, sold or transported intrastate. (Now covered by federal regulation under FIFRA, Section 3.)

   b. An application shall include a copy of the proposed label and a complete statement of all active ingredients.

7. Exemptions - provided for governmental officers, expermental pesticides, pesticides intended solely for foreign use and carriers lawfully engaged in pesticide transportation who disclose all pestinent records.

8. Miscellaneous -Advisory committee created, delegation of dept.'s authority permitted and authorization given to act with other agencies, states and the federal government.

E. Commercial Pest Applicators' Act; CRS '73 35-10-101 et. seq.

1. Licenses.

a. No person shall apply pesticides or operate a pesticide device for hire without obtaining a license and registering each piece of equipment.

b. Applicants must pass both written and oral examinations concerning their experience in and knowledge of pesticide application.

c. Applicants must show evidence of sufficient liability insurance.

d. Private applicators are exempt.

e. Permits may be refused, revoked, suspended or restricted for a variety of specified reasons.

2. Prohibitions and enforcement.

a. The act lists 15 prohibitions such as lack of license, negligent applicatimn or operation, and failure to maintain insurance and records which constitute misdemeanors with fines of $100-$500.

b. Violations of the act may be enjoined by the appropriate D.A.

3. Commissioner of Agricultural may issue rules and regulations, conduct examinations and inspections to assure compliance, and may issue a "stop work order" to any applicator in violation.

F. Structural Pest Control Act, CRS '73, 35-11-101 et seq. - provides a licensing and regulatory program for "structural pest control" which concerns wood-destroying organisms, fumigation and pest control in houses, commercial buildings, and transportation carriers. The program is similiar to that outlined above for the regulation of commercial pest applicators.

G. Weeds, CRS '73, 35-8-101 et. seq. - Supplements the Pest Control Act by authorizing a weed extermination fund at the county level and the declaration of weed extermination areas, placing duties on combine operators in such areas and authorizing the employment of appropriate personnel.

II. Federal

A. Federal Environmental Pesticide Control Act of 1972 (FEPCA), 7 USC 136 et. seq., as amended (Supp. 1973)

1. Introduction - FEPCA substantially revises previous legislation on pesticides which originated in 1910 and culminated in the Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 7 USC §135. The new act substantially expands federal regulation and controls application whereas prior law focused upon pre-application.

2. Registration
    a. All pesticides used in the United States must be registered with the EPA.
    b. Registration criteria includes composition in light of proposed claims for use, labeling, and effects on the environment.
    c. Registration must be renewed every 5 years.
3. Classification
    a. General use - pesticide has no ~~serious~~ adverse environmental impacts and applicators need not obtain federal certification.
    b. Restricted use - any applicator must obtain federal certification and restrictions on use are imposed because of potential serious adverse environmental impact.
4. Administration - the Act and EPA regulations (40 C.F.R. 162-180.10) set for detailed procedures for notice, hearings, evidence, standards and appeals relative to suspension or cancellation of registration and change in classification
5. Prohibition - The Act details numerous prohibitions concerning lack of registration, mislabeling, misuse and revealing trade secrets.
6. Enforcement
    a. Civil penalties are the primary enforcement actions.
    b. "Stop sale, use, or removal" orders for pesticides whose registrations have been cancelled or are an immediate danger to health and welfare.

c. Registration may be refused if the applicant is unable to provide analytical standards for the formulation of the pesticide or fails to comply with the act or regulations.

d. Pesticides may be designated as "restricted use" and be subject to special limitations.

4. Pesticide Dealer License.

   a. No person may engage in the business of pesticide dealer without a license from the commissioner of agriculture.

   b. This requirement does not apply to a pesticide applicator who sells pesticides only as part of his application service.

5. Enforcement

   a. Agency may issue "stop sale, use, or removal" orders in regard to acts concerning pesticides which are not in compliance with the law.

   b. Criminal proceeding may be brought by the appropriate D.A.-- this is infrequent, usually only when bodily injury is involved.

   c. Agency may seize and condemn adulterated, misbranded, unregistered or otherwise improper pesticides.

d. EPA may seize and condemn unregistered, improperly labeled, discolored, misbranded, adulterated and environmentally harmful pesticides.

6. Penalties

a. Criminal - fines of up to $25,000 and up to 1 year imprisonment or both.

b. Civil - fines of up to $1000 for private applicators and to $5000 for commercial operators.

B. Food, Drug and Cosmetic Act, 21USC §§ 346, 46a, and 348 (1970)

1. Food and Drug Administration of HEW has authority over pesticide tolerances in raw agricultural commodities and for processed food.

2. FDA provides monitoring and research of pesticide residues in food.

C. Miscellaneous

1. Some Occupational Safety and Health Act (OSHA) standards for workers using and exposed to pesticides have been set by the Dept. of Labor 38 Fed. Reg. 10715 (1973).

2. A permit must be obtained for the discharge of pesticides from a point source under the Federal Water Pollution Control Act Amendments of 1972. 33 USCA §1342 (Supp. 1973)

3. Pesticides have not yet been activity considered under the Clean Air Act, 42 USC §1857 et. seq.

III. Bibliography

A. Butler, "Federal Pesticide Law" Federal Environmental Law, Environmental Law Institute, pp 1232 -1288 (1974)

B. Note: "Environmental Law: Agricultural Pesticides," 13 Washburn L. J. 53 (1974)

RADIATION

I. Colorado

  A. Radiation Control Act, CRS'73, 25-11-101.

    1. Cooperative agreements - Governor may enter into agreements with the federal government, other states or interstate agencies relating to the control of radiation.

    2. Regulation,

      a. Dept. of Health is designated the state radiation control agency.

      b. Regulatory powers

        1. Licensing of radioactive materials.
        2. Registration of sources of radiation.
        3. Evaluate hazards.
        4. Institute training programs.
        5. Handle emergencies -may issue any orders. appropriate for the protection of the public health and safety.
        6. Inspect property of licensee or registrant.
        7. Impound radioactive materials in emergencies.
        8. Acquire land for the storage or disposal of radioactive materials.
        9. Lease or license property for radioactive materials operations (public hearing requirement),
        10. General supervision, monitoring, accident reporting, labeling requirements and record keeping.

c. Rules and regulations (available from the State Health Dept.)

   1. Registration of radiation machines.
   2. Licensing of radioactive materials.
   3. Standards for protection against radiation.
   4. Use of X-rays and sealed radioactive sources in the healing arts,
   5. Industrial radiographic operations.
   6. Stabilization of uranium and thorium mill tailings.
   7. None of the above rules and regulations shall limit the amount or kind of radiation applied to a person for diagnostic or therapeutic purposes.

3. Advisory Committee - Governor may appoint a public committee to furnish technical advice to the dept.

4. Injunction - Dept. may seek an injunction for violations of the act or any rule, regulation or order issued thereunder.

5. Prohibitions,

   a. No person shall acquire, own, possess, etc., radioactive material, occurring naturally or produced artificially, without a license or registration from the dept.

   b. Violation is a misdemeanor punishable by a fine of $100-$500 and imprisonment of 30-90 days or both.

6. Exemptions.

   a. Electrical equipment not intended to produce radiation if the emissions are below specified levels.

   b. Radiation machines while in manufacture.

   c. Transportation of radioactive material in conformity with regulations of the AEC or ICC,

   d. Sound and radio waves and visible infrared and ultraviolet light.

   e. Mining operations.

B. Colorado Water Quality Control Act, CR5'73 25-8-101 et seq

1. It is unlawful for any person to discharge, any radioactive, toxic or other hazardous water underground unless the water quality control commission, upon application and after investigation and hearing, has first found that there will be no pollution or that the pollution will be limited and that the proposed activity is justified by public need.

2. The commission may issue a permit for such activity subject to specified terms and conditions.

C. Western Interstate Nuclear Compact, CRS '73. 24-60-1401 et seq. - promotes cooperation between the party states in the development and utilization of nuclear technology. Primary emphasis is on research, training, information dissemination and encouragement of development.

D. Underground Nuclear Detenotations in Colorado

1. Plowshare program - AEC program in conjunction with private industry to use controlled nuclear explosions for mining and resource stimulation. Project Rulison detonated a 40-kiloton nuclear device at a depth of 8,425 ft. near Rifle, Colorado on Sept. 10, 1969. Three 30-kiloton nuclear explosives were denotated between 5,840-6,690 ft. in Rio Blanco County about 50 miles north of Grand Junction in Project Rio Blanco on May 17, 1973.

2. Constitutional amendment

   a. On Nov., 4, 1974, Colorado voters amended their constitution to prohibit nuclear detonations except when approved by the voters at a general election, and to require compliance with a state administrative certification process in which sufficient financial resources must be shown to compensate for any damages to persons or property occurring as a result of a nuclear detonation.

   b. The legal effect of the new constitutional provision is not clear because of the doctrines of federal pre-emption and supremacy. Denver District Court has previously held that Colorado has at least some jurisdiction over Plowshare projects. The industrial contractor of Project Rio Blanco applied for and received permits from the Colorado Oil and Gas Conservation Commission and the Colorado Water Pollution Control Commission. Environmentalists brought suit alleging improper issuance of those permits. On May 10, 1973, Denver District Court rejected those allegations and held that Colorado held regulatory power over the project because of the 1968 agreement between AEC and Colorado on radioactive materials operations, and in light of the specific language of the contractor's agreement with the AEC. However, the validity of such a blanket grant of authority to Colorado voters must be considered as unresolved. In any event, the potential legal problems, high cost, and limited success to date indicate that no nuclear detonation projects will be undertaken in the near future.

E. Rocky Flats

1. Rocky Flats is an AEC plant northwest of Denver where an industrial contractor produces nuclear weapon components and and conducts general nuclear research

and development. Pursuant to an agreement between the AEC and Colorado and between Colorado and the contractor, the state could investigate and inspect the premises. Thus, a public Task Force was initially investigating the operation. Problems centered on allegations of leaks of radioactive matter and resulting damage claims.

The Task Force has been replaced with an Advisory Committee now.

II. Federal

A. There have been major changes in Federal regulation of atomic energy matters.

1. Public Law 93-438 (42 U.S.C. §5814) abolished the Atomic Energy Commission (A.E.C.). The Nuclear Regulatory Commission (N.R.C.) was established (42 U.S.C. §5814) in its place and all the licensing and regulatory functions of the A.E.C. were transferred to N.R.C.

2. The Office of Nuclear Reactor Regulation was created by 42 U.S.C. §5843. This Office handles licensing

and regulations involving all facilities and materials licensed under the Atomic Energy Act of 1954 associated with the construction and operation of reactors.

3. The Office of Nuclear Safety and Safeguards, created by 42 U.S.C. §5844, handles the licensing and regulations involving processing, transporting and handling of nuclear materials, including safeguards and theft.

4. All research and development activities are controlled by the Energy Research and Development Administration, also created by Public Law 93-438.

B. National Environmental Policy Act of 1969 (NEPA) 42 USC §4321 et seq. (1970)

1. Requires an environmental impact statement to weigh environmental factors in any consideration of major federal action significantly affecting the quality of the human environment. Nuclear power plant licensing, material licensing, waste disposal and nuclear detonations are major federal actions. Calvert Cliffs' Coordination Committee v AEC, 449 F.2d 1109 (D.C. Cir. 1971).

2. EPA - under NEPA, other federal statutes, the Executive Reorganization Plan No. 3 of 1970 (35 Fed. Reg. 15623) (1970) and a variety of interagency memoranda, the EPA has substantial powers and responsibilities relating to radiation.

    a. Federal Radiation Council - established to advise the President on radiation matters affecting health and to provide federal agencies with advice on radiation standards. These function are now performed by EPA and the Council abolished.

    b. Bureau of Radiological Health (of HEW) established to provide research and advice; functions transferred to EPA.

c. Standards - EPA now holds the AEC's former authority to set limits for the emmission of radiation into the environment.

d. Ocean disposal - EPA permit required for the transportation of radioactive wastes for the purpose of ocean disposal.

e. Research and development - EPA may undertake such projects and may provide training and grants to the states.

f. Discharges - AEC and EPA memorandum of understanding states that AEC would assure that discharges from licensed facilities would not exceed generally applicable standards established by the EPA. 38 Fed. Reg. 24936 (Sept. 11, 1973).

C. Miscellaneous

1. Transportation - the Dept. of Transportation Federal Aviation Administration, Postal Service and Coast Guard all regulate the transportation of radioactive materials. Hearings are presently in progress in Washington, D. C.

2. Safety

a. Radiation Control for Health and Safety Act of 1968, 42 USC 2636 (1970)

1. HEW may set standards for the emission of radiation from electronic products such as microwave ovens.

        2. Technical advisory panel established.

    b. Occupational Safety and Health Act of 1970 (OSHA). 29 USC §651 (1970)

        1. Secretary of Labor may establish as an occupational health and safety standard any standard established by any federal agency.

        2. AEC rules control except where they are inapplicable then the secretary's regulations prevail.

III. Bibliography

A. Green and Fridkis, "Radiation and the Environment," *Federal Environmental Law*, Environmental Law Institute, pp. 1022-1056 (1974)

B *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970) (denied injunction of Project Rulison explosion for lack of proof that it was a present danger or was outside of the AEC's authority) (See Yannacone et al., *Environmental Rights and Remedies*, 10.11 - 10.15 (1974) for a detailed discussion of the case and trial strategy and procedure.) See also, 415 F. 2d 437 (1970)

SOLID WASTE

I. Colorado

A. Solid Waste Disposal Sites and Facilities, C.R.S. '73, 30-20-101 et seq.

1. "Solid Waste" means garbage, refuse, sludge of sewage disposal plants, and other discarded solid materials, including solid waste materials resulting from industrial, commercial, and community activities, but does not include agricultural wastes.

2. "Solid wastes disposal site and facility" means the location and facility at which the deposit and final treatment of solid wastes occur.

3. Certificate of Designation: It is unlawful for any person to operate a solid waste disposal site and facility in an unincorporated portion of any county without a certificate of designation issued by the county commissioners.

4. Application

a) A detailed one must be filed with the county commissioners.

b) The application must be approved by the Colo. Dept. of Health which has established pertinent rules and regulations concerning odor and rodent control, water and air quality, and fencing.

c) In considering an application, the board of county commissioners shall take into account the effects of such a facility on the surrounding land, convenience and accessibility to users, wind and climatic conditions, ability of applicant to comply with state laws, and rules and regulations of health departments, and other information presented at a public hearing.

d) Certificate is subject to revocation for failure to comply with applicable laws, rules and regulations.

5. Private disposal - allowed only at an approved site or on one's own property so long as it does not constitute a public nuisance and is in accordance with pertinent rules and regulations of the state health department.

6. Governmental units - may establish or contract for a facility.

7. Technical assistance - shall be rendered to facility owners and operators by state and local health departments.

8. Public nuisance - any abandoned facility and ones found to be operating in violation of the laws, rules or regulations shall be deemed to be a public nuisance and may be enjoined by the state, county or municipality.

9. Violations - misdemeanor; each day of violation is a separate offense and is punishable by fine of $100. and imprisonment for not more than 30 days, or both.

B. Solid Waste Disposal Districts, C.R.S. '73, 30-20-201 et seq. - Counties may establish such districts for the collection and disposal of garbage and waste in unincorporated areas.

C. Litter

1. "Litter" means all rubbish, waste material, refuse, garbage, trash, debris, or other foreign substances, solid or liquid, of every form, size, kind and description.

2. Prohibition - no person shall deposit, throw or leave any litter on any public or private property unless the property is designated for disposal and the disposal is authorized, the litter is placed in a receptacle installed for that person, such person is in lawful possession of such property or the act is done under the direction of the owner or tenant.

3. Penalty

   a) Littering is a class 2 petty offense punishable by a fine of $15. if only one item is deposited; more than one item creats a class 1 petty offense punishable by a fine of not more than $500 fine or not more than 6 months imprisonment, or both.

   b) At its discretion, a court may suspend a fine upon the condition that the convicted person gather and remove litter from some specific property.

D. Abandoned Autos

1. "Abandon" means to leave on public property or private property without permission with the intention not to retain possession or to assert ownership; prima facie evidence of intent is leaving a motor vehicle unattended and unmoved for 7 days, removing license plates and identifying marks, a vehicle so damaged its only value is for junk or salvage, failure to remove a vehicle within 3 days after notification and request to move by a law enforcement agency.

2. Penalty - class 3 misdemeanor punishable by a fine of $50.-700, and not more than 6 months imprisonment, or both.

E. Junkyards - see Aesthetics

II Federal

A. The Solid Waste Disposal Act of 1965, 42 USC §3251 (1970)

1. Policy - solid waste disposal recognized as a problem of national impact which frequently creates scenic blights, health hazards, and air and water pollution.

2. Research and financial assistance

a) Dept. of Health, Education and Welfare primarily responsible for research and technological development programs for improved solid waste disposal.

b) State and local governments may obtain technical and financial assistance for research, planning and personnel training.

B. The Resource Recovery Act of 1970 (amendments to the 1965 Act) 42 USC §3251 et seq. (1970)

1. Expanded the federal role in solid waste disposal and gave the EPA broad responsibilities in the area.

a) Provision of technical and financial aid to state and local governments.

b) Promotion of research into collection, revovery and recycling of solid wastes.

c) Provision of occupational training.

d) Issuance of guidelines for disposal systems - sanitary landfill and incinerator guidelines have been promulgated.

2. Agency emphasis

a) Hazardous wastes (radiological, toxic, chemical and biological wastes of potential harm to the public health).

b) Recycling - NEPA declares a national policy of maximizing recycling of depletable resources.

c) Energy production from solid wastes.

d) Packaging

C. Miscellaneous

1. Ocean Dumping - several federal statutes concern the disposal of wastes in oceans. See, the Marine Protection, Research and Sanctuaries Act of 1972 (Ocean Dumping Act), 33 USCA §1401 et seq. (Supp. 1973) and the Federal Water Pollution Control Act of 1972 Amendments, 33 USCA §1251 et seq. (Supp. 1973).

2. Tax Structure

a) Federal tax structure provides incentives primarily through capital gains treatment and depletion allowance for the production and use of virgin resources in comparison to secondary resources.

b) Proposals have been made to equalize the tax status of virgin and secondary materials or to favor the latter. However, the economic disruptions of such changes and the protests of virgin material groups make quick, significant changes doubtful.

3. Transportation rates - it has been charged by the EPA and others that transportation charges discriminate against recycled and secondary materials. See, *SCRAP v. U.S.*, 346 F.Supp. 189 (D.D.C. 1972) and *U.S. v. SCRAP*, 412 US 669 (1973).

4. Procurement of supplies - the General Accounting Office, the Defense Supply Agency, the Federal Highway Administration and the EPA all have studies or programs concerning increased federal use and purchasing of secondary materials.

5. Proposals - Congress is now considering various proposals either to increase or decrease federal activity in solid waste management. Most commentators expect greater federal involvement in recycling, energy matters and in hazardous waste disposal but a comprehensive federal regulatory system such as exists in other areas is improbable.

III. Nuisance

Solid waste disposals have been enjoined as public nuisances. See Town of Clayton v Mayfield, 82 N.M. 596, 485 P.2d 352 (1971) (operation of a junkyard enjoined as a nuisance even though town ordinances existed which could subject the junkyard to several penalties for violations).

IV. Bibliography

A. Bryson, "Solid Waste and Resource Recovery," Federal Environmental Law, Environmental Law Institute, pp. 1290-1315 (1974).

B. Council on Environmental Quality, 5th Annual Report (Dec. 1974).

WEATHER MODIFICATION

I. Colorado - Weather Modification Act of 1972, C.R.S. 36-20-101, et seq.

A. "Weather Modification" means any program, operation, or experiment intended to induce changes in the composition, behavior, or dynamics of the atmosphere by artificial means.

B. The State of Colorado claims the right to all the moisture suspended in the atmosphere which falls or is artificially induced to fall within its borders. Said moisture is dedicated to the use of the people of Colorado pursuant to Article XVI, Secs. 5 and 6 of the Colorado Constitution and as provided by law. The state claims the prior right to increase or permit the increase of precipitation and to modify the weather.

C Administration

1. Executive Director of the Department of Natural Resources, assisted by a public advisory committee, administers the licensing and permit programs and may conduct or contract for research.
2. Regulations have been promulgated and are available from the Department.
3. Cease and desist orders may be issued by the Director.

D. Licenses

1. No person may engage in weather modification without a license.
2. Licensee must meet strict educational and experience requirements.

E. Permits

1. Each weather modification project must be

authorized by a permit and be conducted under the supervision of a licensee.

2. Each project must provide a detailed operational plan, proof of financial responsibility, notice and a public hearing, and periodic reports.
3. Exemptions for certain research experiments and for emergencies.

F. Violations - misdemeanors punishable by a fine of not more than $5,000 or imprisonment for up to 6 months, or both.

G. Immunity and liability
   1. State claims total immunity
   2. Mere dissemination of materials into the atmosphere shall not constitute a trespass or a nuisance.
   3. Absence of a license is negligence per se.
   4. Existence of license or permit is not admissible as a defense in actions for damages or injunctive relief.

H. Status - Four weather modification permits have been issued for operations in 1975, and there are about 10 licensees. Present projects all seek to increase the amount of precipitation, mostly for agricultural use. Weather modification for the benefit of winter sports recreation has been discussed. Experimental programs such as CSU's are also active.

II. Federal
   A. No substantive law on weather modification.
   B. Several agencies have carried on projects and others are involved in research.
   C. Bureau of Reclamation has an ongoing program to enhance spring runoff in southwestern Colorado for which their contractor has obtained a state permit.

III. Bibliography - (Discussion of unique tort problems, interstate conflicts, and impact on water law).

- A. Clark, "Weather and Climate Modification", Waters and Water Rights, Vol. 1, §55.4.
- B. Corbride and Moses, "Weather Modification: Law and Administration", 8 Nat'l. Res J. 207 (1968).

WILDLIFE

I. Colorado

- A. Predatory Animals - Control, C.R. S. '73, 35-40-101 et. seq.
  - 1. Administration
    - a. State Dept. of Agriculture charged with the duty to control predatory animals which include coyotes, wolves, mountain lions and bobcats.
    - b. Dept. may enter into agreements with the federal government, counties, associations or corporations for such control.
    - c. Predatory animal fund established by a tax on all sheep and goats.
  - 2. Permit system for poisoning of predators.
    - a. Dept. charged with adoption of an annual permit system for the poisoning of predators by livestock operators on private lands.
    - b. Such system must be developed in cooperation with the division of wildlife and must balance the need to control predators with the protection of humans and other forms of life.
    - c. Point of use shall be at least 200 yards from the nearest property line or public right-of-way.
    - d. Permits may set forth conditions, restrictions and may require the posting of public notice that poisons are in use.

e. Colorado issues 200-300 permits per year with various restrictions depending on the circumstances. Few problems have been reported to the state although a few injuries occur each year and environmentalists have complained about the program. The state also undertakes limited predatory control programs on federal lands under agreements with the federal government which allows only trapping or hunting and no poisons.

3. Bounties - creates system of bounties ($1 per coyote and $2 per wolf) to be paid by the state.

B. Protection of Sheep and Cattle - Control Programs, CRS '73, 3 -40-201 et. seq.

1. Control programs

a. County commissioners, upon the recommendations of an association of sheep or cattle growers, may conduct a predatory animal control program. Owners of 51% of the sheep or cattle can require the establishment of a program by petition to the county.

b. License fee on sheep and cattle instituted to fund the protective program.

2. County control programs shall be in addition to the state programs outlined above.

C. Rodents and Predatory Animals - Agricultural Control, CRS '73 35-7-101 et. seq. and 201 et. seq.

1. Public nuisance - declares that in areas infested with rodent pests such as jackrabbits, prairie dogs, ground squirrels, pocket gophers and rats in sufficient numbers as to materially injury agricultural or

horticultural crops, such infestation is a public nuisance.

2. Abatement
    a. State Dept. of Agriculture must speedily remedy the situation and may enter agreements with the United States and private landowners for control operations.
    b. Cooperative agreements between landowners within an infested area are encouraged.
    c. The Dept. may sell strychnine and other poisons to cooperators in rodent control programs but shall keep detailed records.
    d. Financial burden rests with individual landowners who must reimburse the government's expenses.
3. Counties - authorizes counties to purchase equipment, employ personnel, levy taxes and put into operation any plan for the eradication and control of rodents and predatory animals.

D. Division of Wildlife, Dept. of Natural Resources, CRS '73, 33-1-101

1. Introduction
    a. "Wildlife" means wild vertebrates, mollusks, crustaceans, and fish.
    b. It is the policy of Colorado that wildlife and their environment and the natural, scenic, scientific and outdoor recreation areas of this state are to be protected, preserved, enhanced

and managed for the use, benefit, and enjoyment of the people of Colorado and visitors to this state. 33-1-101 (1)

c. All wildlife within Colorado not held by lawfully acquired private ownership is declared to be the property of this state for the use and benefit of all people. Right, title, interest acquisition, transfer, sale or possession of wildlife shall be permitted only as provided for by law. 33-1-104

2. The general administration of wildlife matters (ie., hunting, land acquisition, fishing, wildlife programs and construction of recreational facilities) lies with the Division of Wildlife which is under the jurisdiction of the Wildlife Commission, a public body appointed by the Governor.

3. Federal Cooperation - Colorado, thru the division has assented to the Pittman-Robertson Act (wildlife restoration) and the Dingell-Johnson (fish restoration and management) which are federal statutes providing financial aid to assenting states. 32-2-101

E. Damage by Wildlife, CRS'73, 33-3-107

a. State of Colorado shall be liable for only certain damages caused by wildlife.

  1. Damages to real or personal property caused by bear or mountain lion ($200 deductable for each 30 day period)

  2. Damages caused by wildlife under the direct control of the division of wildlife.

    3. Damages caused by the use of damage prevention materials under the control of persons under the direction of the division.
    4. Damages caused by "big game" to orchards established prior to 1/1/70, crops under cultivation or harvested.
  b. Excessive damages shall be grounds for the division to authorize the killing of a specified number of the wildlife causing the damage.
  c. Procedure
    1. Claims made to the division.
    2. Arbitration may be invoked by claimant unless the division denies liability.
    3. Actions for review of the division's denial and for damages may be brought in the district court of the judicial district wherein the damage occurred.
    4. Payments of claims are by warrant from the game cash fund.

F. Protection of Fishing Streams
  1. No state agency shall obstruct, damage, diminish, destroy change, modify or vary any natural existing shape and form of any stream or its banks or tributaries by any construction without first notifying the wildlife commission.
  2. Notice shall be given not less than 90 days prior to construction and shall detail the operatio

3. If the commission finds an adverse effect on the stream it shall notify the agency with recommendations for alternatives.

4. If the agency refuses to modify its original plans, the commission may seek arbitration by the governor who shall decide the matter without judicial review.

G. Nongame and Endangered Species Conservation Act, CRS'73, 33-8-101 et. seq.

1. The division of wildlife shall study, manage and prepare a list of nongame and endangered species and may issue rules and regulations pursuant to such functions.

2. Except as provided for by law, no person shall take, possess, transport, export, process, sell or offer to sell either nongame wildlife designated by the division to be in need of management or any species indigenous to this state determined to be endangered. Permits for such acts may be issued.

3. Violations - misdemeanors punishable by fines of $50-$1000 and imprisonment for up to 1 year or both.

H. Miscellaneous

1. Birds - protection and regulation of birds and bird hunting. CRS'73, 33-20-101 et. seq.

2. Fish - regulation of fishing, fish eggs and stocking. CRS'73, 33-21-101 et. seq.

3. Furbearers and Trapping - provision concerning trapping licenses, use of dogs, fur dealers, and destruction of beaver and muskrat dams. CRS'73, 33-22-101 et. seq.

4. Land use

a. House Bill 1041 ('74 S.L., Ch 80, p 335) - defines "Natural resources of statewide importance" as shorelands of major publicly-owned reservoirs and significant wildlife habitats in which wildlife species, as identified by the division of wildlife, in a proposed area could be endangered. Local governments shall give consideration to the protection of areas essential for wildlife habitat. Areas containing or having a significant impact upon such wildlife habitats may be declared areas of state interest and any development therein would require a permit.

b. The Local Government Land Use Control Enabling Act of 1974, H.B. 1034, ('74 S.L., Ch 81. p. 353)- authorizes local governments to regulate the use of land by protecting lands from activities which would cause immediate or forseeable material danger to significant wildlife habitat and where an activity would endanger a wildlife specie.

II. Federal

A. The Fish and Wildlife Coordination Act, 16 USC §661, et. seq. (1970)

1. Policy - that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development.

2. Consultation - any water-resources development project of the United States or licensed by the U.S. must be preceeded by consultation with the U.S. Fish and Wildlife Service, the Dept. of the Interior, and the head of the state wildlife agency with a view to the conservation of wildlife resources. If the project is one of a federal agency, it must make adequate provision for the conservation and management of wildlife. See, Akers v Resor, 339 F. Supp. 1375 (W. D. Tenn 1972)

3. Cooperation - Secretary of Interior shall provide assistance to states and private and public groups in the development and protection of wildlife. Additionally, the Secretary may direct wildlife studies including the effects of pollution on wildlife.

B. The Endangered and Threatened Species Preservation Act of 1973, Pub. Law 93-205, 93rd Cong. 1st Sess. (1973) 87 Stat 884 (repealed the Endangered Species Conservation Act of 1969, 16 USC §668 aa et. seq.)

1. Policy - all federal agencies shall seek to conserve endangered and threatened species and shall utilize their authorities to further the purposes of this act. Recognition given to the aesthetic, ecological values of wildlife, and that state program meeting national standards are essential to wildlife conservation.

2. Scope
    a. Fish and wildlife - defined so as to include every member of the animal kingdom and its eggs and bodily parts.
    b. Plants - defined broadly and entitled to federal protection for the first time under the 1973 act. However, until the Smithsonian Institution completes its plant study and recommends legislation, plant protection goes only to import-export situations.
3. Classification
    a. Endangered - a species in danger of extinction throughout all or a significant portion of its range.
    b. Threatened - a species likely to become endangered.
    c. Secretaries of Interior (primary responsibility) and Commerce shall prepare the classification lists of endangered and threatened species.
4. Prohibitions
    a. Endangered species - virtually all acts which tend to diminish species are prohibited. Taking, transportation and sale of endangered species are included.
    b. Threatened species - it is unlawful to violate a regulation issued by the Secretary concerning threatened species. Since the Secretary is still in the early stages of listing threatened species and of formulating regulations there are no prohibitions.

5. Penalties
    a. Criminal - fines of up to $20,000 and one year imprisonment. Conviction may also result in loss of federal lease or federal fishing and hunting permit. Informers may receive up to $2500.
    b. Civil - fines of up to $10,000.
6. Administration
    a. Licenses - Secretary of Interior shall license all importers and exporters of fish, wildlife and plants and may grant limited exemptions from the Act by permit.
    b. Land acquisition - Secretary must consult the state but shall seek to acquire essential wildlife habitat. Monies made available from the Land and Water Conservation Fund. 16 USC §460 (1970), and lands purchased shall be part of or coordinated with the National Wildlife Refuge System, 16 USC §715 (a) (1970).
    c. Intergovernmental cooperation -
        1. States - the Secretary shall encourage and assist states in a conservation program for the threatened and endangered species and if they meet national standards he can pay up to two-thirds of the cost of the program.
        2. International - promotes and urges cooperation with other nations to further the purposes of the act.

7. Citizen participation - the 1973 act grants limited rights to citizens to participate by comments and petitions in the classification and regulations processes, and to bring suit.

C. Miscellaneous - federal laws concerning wildlife are too numerous to list and outline. The following laws are among the more will known and important. See generally, Chapter 16 of USC.

1. National Wildlife Refuge Systems, 16 USC §715 (a) (1970). - established in 1966 as a network of lands and waters to meet the people's needs for areas where the entire spectrum of human benefits associated with wildlife are enhanced and made available. Thus, hunting and fishing as well as conservation are promoted.

2. Migratory Bird Treaty Act, 16 USC §701 (1970). - see, Note: "The Migratory Bird Treaty: Another Feather in the Environmentalist's Cap," 19 S. Dakota L. Rev. 307 (1974), for complete discussion including possible legal actions brought under the Act.

3. The Bald Eagle Act, 16 USC § 668 (1970)

4. Wild Horses and Burros Act, 16 USCA §133 - this Act was recently declared unconstitutional, at least in part, as being in derogation of the sovereign right of a state to regulate wild animals within its boundaries.

5. Marine Mammal Protection Act of 1972, 16 USC §1361 et. seq. (Supp. 1973) - creates a moratorium on the taking and importation of marine mammals and a permit system for long term regulation.

6. Estuarine Areas Act, 16 USC §1221 et. seq. (1970) - study and inventory all estuaries and comment upon any federal projects affecting such areas.

III. Bibliography

A. Boyd, "Federal Protection of Endangered Wildlife Species," 22 _Stan_. _L. Rev._ 1289 (1970)

B. "A Compilation of Federal Laws Relating to Conservation and Development of Our Nation's Fish and Wildlife Resources, Environmental Quality and Oceanography," Stock No. 5270 - 01993 (U.S. Gov't Printing Office).

C. Coggins, "Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973", 51 _N_. _Dakota_ _L_. _Rev_. 315 (1975)

D. Guilbert, "Wildlife Preservation under Federal Law," _Federal Environmental Law_, Environmental Law Institute, pp. 550-594 (1974)

Federal Freedom of Information Act

ENVIRONMENTAL LAW II INSTITUTE, VAIL, COLORADO

SEPTEMBER 11, 1976

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To: Participants, Environmental Law II Institute at Vail, Colorado

From: Kent R. Olson　　　　　　　　　　Date: August 17, 1976

FREEDOM OF INFORMATION ACT (FOIA)

(5 U.S.C. §§551-552: originally passed on 9-6-66, effective date 7-4-67; amended 11-21-74, effective date 2-19-75)

I. Who can be required to disclose?

A. FOIA is a mandatory disclosure requirement for federal agencies, not for federal lessees or other non-federal agencies. See Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 16 (1974); Grumman Aircraft Eng. Corp. v. Renegotiation Bd., 482 F.2d 710, 714 (D.C. Cir. 1973); Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

B. Several federal bodies, including Congress and the federal courts, are specifically exempted from the definition of "agency" in §551(1).

C. In 1974, §552(e) was added to the FOIA, which expanded this "agency" definition to include "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." See Rocap v. Indiek, ___ F.2d ____ (D. C. Cir. 1976), 45 L.W. 2019 (July 13, 1976), which held that the Federal Home Loan Mortgage Corporation came within this expanded "agency" definition.

II. What must be disclosed?

A. FOIA requires only records be disclosed. See §552(a)(3).

B. The term "records" is not defined in the FOIA.

C. Former Attorney General Ramsey Clark, in a memorandum under date of June, 1967, to guide federal agencies in implementing the FOIA, defined "records" to encompass "all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics. . . ."

D. This definition of records was essentially accepted in Save The Dolphins v. U.S. Dept. of Commerce, 404 F.Supp. 407, 411 (N.D. Cal. 1975), which held that the term "records" is not limited to written documents, but also includes motion picture film. Cf. Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973).

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III. Must all records be disclosed by the agency?

A. If the records do not fall within one or more of the nine FOIA exemptions in 552(b), the agency must disclose them; an agency's disclosure obligations are construed broadly and these nine exemptions narrowly, and any ambiguities are resolved in favor of disclosure. See Dept. of Air Force v. Rose, supra _____ U.S. at _____, 48 L.Ed.2d at 21, 44 L.W. at 4505-06; Renegotiation Bd. v. Bannercraft Clothing Co., supra 415 U.S. at 19,22; EPA v. Mink, supra 410 U.S. at 80; Ethyl Corp. v. EPA, 478 F.2d 47, 49 (4th Cir. 1973); Fisher v. Renegotiation Bd., 473 F.2d 109, 112 (D.C. Cir. 1972); Sears, Roebuck & Co. v. General Services Admin., 384 F.Supp. 996, 1001 (D.C.D.C. 1974).

B. Such a strict construction is valid as a general approach, but is not absolute and is not a substitute for thinking through on the merits whether the two or more constructions of an exemption are of equal force in terms of the language and purpose of the exemption. See FAA Administrator v. Robertson, 422 U.S. 255 (1975); Vaughn v. Rosen, 523 F.2d 1136, 1149 n.9 (D.C. Cir. 1975).

C. By way of example, this broad disclosure policy is recognized by the Department of the Interior's regulations. See 43 C.F.R. §2.13(a) (1975).

IV. To whom must disclosure be made?

A. Records must be made available "to any person." See §552(a)(3).

B. The interest or want of interest of a "person" in the disclosure is irrelevant. See Robles v. EPA, 484 F.2d 843, 846-47 (4th Cir. 1973). Cf. EPA v. Mink, 410 U.S. 73, 92 (1973).

C. "Person" is defined in §551(2) as including "an individual, partnership, corporation, association, or public or private organization other than an agency." See Neal-Cooper Grain Co. v. Kissinger, 385 F.Supp. 769, 776 (D.C.D.C. 1974), where a foreign government (Mexico) was held to come within this "person" definition.

V. What if the agency refuses to disclose?

A. The person seeking the disclosure may bring an action to enjoin the agency's refusal to disclose in the U.S. district court for any of the following districts:

1. where the complainant resides; or
2. where the complainant has its principal place of business; or
3. where the agency records are situated; or
4. in the District of Columbia. See §552(a)(4)(A).

B. Burden of proof is on the agency to sustain its refusal to disclose in such an injunctive proceeding. See §552(a)(4)(B).

C. The federal district court in such a proceeding must determine the matter de novo. See §552(a)(4)(B); Sears, Roebuck & Co. v. General Services Admin., 402 F.Supp. 378, 382-83 (D.C.D.C. 1975).

D. Except as to causes the court considers of greater importance, such a proceeding and appeals therefrom "take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way." See §552(a)(4)(D).

E. The 1974 amendment to the FOIA has imposed further limitations and sanctions on an agency's refusal to disclose, which are discussed in item XI.C and D hereinafter.

VI. What if any portion of the records requested to be disclosed contain information covered by any of the nine exemptions in §552(b)?

If the agency refuses to segregate the disclosable and nondisclosable portions of the information, the federal district court may do so in camera. See §552(a)(4)(B); Dept. of Air Force v. Rose, ____ U.S. at ____, 48 L.Ed.2d at 28-29, 44 L.W. at 4509-10; Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975), cert. denied, 421 U.S. 992, rehearing denied, 422 U.S. 1049. Cf. EPA v. Mink, supra 410 U.S. at 91-93.

VII. What is the effect of the agency's promise to one submitting records that it will not disclose them?

Even though an agency promises not to disclose and such promise induces one to submit records to that agency, a court would not have jurisdiction to sustain the agency's refusal to disclose if the records do not fall within one or more of the nine FOIA exemptions. See Petkas v. Staats, 501 F.2d 887, 889-90 (D.C. Cir. 1974); Robles v. EPA, supra 484 F.2d at 846; Union Carbide Corp. v. FTC, No. 76-0793 (D.C.D.C. May 7, 1976); Pharmaceutical Mfrs. Ass'n v. Weinberger, 411 F.Supp. 576, 579 (D.C.D.C. 1976); Save The Dolphins v. U.S. Dept. of Commerce, supra 404 F.Supp. at 411; Consumers Union v. Veterans Admin., 301 F.Supp. 796, 806 (S.D.N.Y. 1969), dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

VIII. Is a person's right to disclosure under the FOIA increased or diminished by the fact that such person is in litigation?

The FOIA does not increase or diminish one's litigation discovery rights. See Renegotiation Bd. v. Bannercraft Clothing Co., supra 415 U.S. at 24; Electri-Flex Co. v. NLRB, 412 F.Supp. 698, 702 (N.D.Ill. 1976); Capital Cities Communications, Inc. v. NLRB, 409 F.Supp. 971, 977 (N.D.Cal. 1976); Local 30 v. NLRB, 408 F.Supp. 520, 524 (E.D.Pa. 1976); Climax Molybdenum Co. v. NLRB, 407 F.Supp. 208, 209 (D. Colo. 1975).

IX. Can an agency be enjoined from disclosing records (a "reverse-FOIA suit")?

A. Most courts start with the premise that the FOIA makes disclosure mandatory unless the records come within one or more of the nine FOIA exemptions, but, that if these records do come within at least one of these exemptions, the FOIA makes non-disclosure thereof by the agency discretionary, not mandatory. *See* Pennzoil Co. v. FPC, 534 F.2d 627, 629-30 (5th Cir. 1976); Charles River Park "A," Inc. v. Dept. of H.U.D., 519 F.2d 935, 942 (D.C. Cir. 1975); Chrysler Corp. v. Schlesinger, 412 F.Supp. 171, 175 (D.Del. 1976); Sears, Roebuck & Co. v. General Services Admin., *supra* 402 F.Supp. at 382. *Contra*, Westinghouse Electric Corp. v. Schlesinger, 392 F.Supp. 1246, 1250 (E.D.Va. 1974). *Cf.* Moore-McCormick Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945, 950 (4th Cir. 1974) (dictum).

B. Sovereign immunity is not applicable.

1. Review of an agency's action under the Administrative Procedure Act (APA) constitutes a waiver of sovereign immunity. *See* Sears, Roebuck & Co. v. General Services Admin., *supra* 384 F.Supp. at 1001.

2. Sovereign immunity is not a bar to a proceeding to enjoin an agency's disclosure under the FOIA. *See* Burroughs Corp. v. Schlesinger, 403 F.Supp. 633, 634-36 (E.D.Va. 1975).

C. Some courts might limit relief in a "reverse-FOIA suit" to a declaratory judgment or judicial review under the APA. *Cf.* Sears, Roebuck & Co. v. General Services Admin., *supra* 402 F.Supp. at 382-83.

1. Declaratory judgment

(a) This was the only relief sought in *Sears*.

(b) De novo standard applies in such review.

(c) If the agency's decision to disclose is based solely on its finding that it is compelled to do so by the FOIA, there is an "actual controversy," and a declaratory judgment is an appropriate remedy.

2. Judicial review under the APA

(a) If an agency wants to exercise its discretion to disclose records falling within one or more of the FOIA exemptions, the FOIA does not apply and the remedy of the person seeking to prevent a disclosure thereof is under the judicial review section of the APA. *Cf.* Charles River Park "A," Inc. v. Dept. of H.U.D., *supra* 519 F.2d at 941.

(b) The standard to be applied in such a review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See also* Charles River Park "A," Inc. v. Dept. of H.U.D., *supra* 519 F.2d at 943; Chrysler Corp. v. Schlesinger, supra 412 F.Supp. at 177. *Cf.* Burroughs Corp. v. Schlesinger, *supra* 403 F.Supp. at 636.

(c) In applying this standard, applicable statutes, orders, rules and regulations must be considered.

(d) In applying this standard, the FOIA's exemptions are relevant only as guidelines. *See also* Pennzoil Co. v. FPC, *supra* 534 F.2d at 630. *Contra*, Neal-Cooper Grain Co. v. Kissinger, *supra* 385 F.Supp. at 775.

3. However, as a practical matter, many courts have granted injunctive relief in a "reverse-FOIA suit."

(a) Temporary restraining orders and/or preliminary injunctions were granted in the following cases.

(i) Charles River Park "A," Inc. v. Dept. of H.U.D., *supra* 519 F.2d at 938, 944.

(ii) Pennzoil Co. v. FPC, *supra* 534 F.2d at 629-32. The court here considered several standards: "[i]n the proper case, where releasing the information serves no legitimate function"; abuse of discretion under the APA; balancing of public and private interests.

(iii) Union Carbide Corp. v. FTC, ___ F.Supp.___, (No. 76-0793, D.C.D.C., May 7, 1976).

(iv) Burroughs Corp. v. Schlesinger, *supra* 403 F.Supp. at 637.

(v) Westinghouse Electric Corp. v. Schlesinger, *supra* 392 F.Supp. at 1250-51. In this case, the court applied a de novo standard.

(b) Permanent injunction granted in Chrysler Corp. v. Schlesinger, *supra* 412 F.Supp. at 177-78.

4. Other courts have considered injunctive relief in a "reverse-FOIA suit," but have denied such relief based on a failure to show "a reasonable probability of prevailing on the merits." *See* Neal-Cooper Grain Co. v. Kissinger, *supra* 385 F.Supp. at 775.

5. May courts under their inherent and traditional equity powers enjoin an agency from disclosing FOIA records?

(a) Renegotiation Bd. v. Bannercraft Clothing Co., supra 415 U.S. at 19-20, suggests that such an injunction may be proper, although this language is dictum, because the issue therein pertained to an exhaustion of administrative remedies in a renegotiation case wherein an injunction was sought to enjoin an agency from withholding records.

(b) Other cases in which injunctive relief was sought to enjoin an agency from withholding records:

(i) See Nat'l Parks and Conserv. Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), wherein this court gratuitously noted that FOIA exemption (4) "may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position," even though the agency has no interest in keeping the information secret.

(ii) See Pharmaceutical Mfgs. Ass'n v. Weinberger, supra 401 F.Supp. at 444.

(iii) Cf. Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345 (D.C. Cir. 1972).

(iv) See also Note, Administrative Law -- The Freedom of Information Act and Equitable Discretion, 51 DEN. L.J. 263 (1974).

X. What are these nine FOIA exemptions?

A. Exemption (1) --"(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order"

1. Prior to the 1974 Amendments to the FOIA, this exemption read: "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy". EPA v. Mink, supra 410 U.S. at 81-84, discusses the legislative history of the former version of this exemption.

2. The leading case on this exemption, as amended in 1974, is Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975),

cert. denied, 421 U.S. 992, rehearing denied, 422 U.S. 1049. All that need be shown relative to element (B) of this exemption is that the information is classifiable and that it is embodied in a classified document. See Knopf, supra 509 F.2d at 1369.

3. What is the relationship of this exemption to "executive privilege"?

   (a) The government must make an express claim of this privilege. See Soucie v. David, supra 448 F.2d at 1071-72.

   (b) As to records not qualifying as "state secrets," only those portions of such records which are a part of the "deliberative or policy-making processes" of government, and not the "purely factual" material therein, are entitled to this exemption's protection. See Ethyl Corp. v. EPA, 478 F.2d 47, 51-52 (4th Cir. 1973).

   (c) If the President has determined by Executive Order to keep particular documents secret, the courts are not free to inquire into the soundness of executive security classifications where the agency invokes this exemption. See Schaffer v. Kissinger, 505 F.2d 389, 390 (D.C. Cir. 1974).

   (d) The relationship between "executive privilege" and exemption (5) is discussed in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

B. Exemption (2) -- "related solely to the internal personnel rules and practices of an agency"

1. Application of this exemption to prevent disclosure of records by an agency has been strictly construed.

2. The leading case is Dept. of Air Force v. Rose, supra ____ U.S. at ____, 48 L.Ed.2d at 22-26, 44 L.W. at 4506-08. Where disclosure poses no risk of circumvention of an agency's regulation, this exemption does not apply to matters in which the public interest is "genuine and significant." In Rose, this "public interest" was in the disclosure of case summaries of cadet honor and ethics hearings.

3. There is a presumption that the public lacks any substantial interest in routine "house-keeping" matters, such as parking facilities, lunchrooms and sick leaves, in contrast to personnel management evaluations. See Vaughn v. Rosen, supra 523 F.2d at 1141.

C. Exemption (3) -- "specifically exempted from disclosure by statute"

1. FAA Administrator v. Robertson, 422 U.S. 255 (1975) is the leading case on this exemption.

(a) A broad definition of "specifically exempted" was adopted and a split of authority among some circuits was resolved. Theretofore, the D.C. Circuit in Schechter v. Weinberger, 506 F.2d 1275 (D.C. Cir. 1974), and the Third Circuit in Stretch v. Weinberger, 495 F.2d 639 (3d Cir. 1974), had construed this language more narrowly; the Ninth Circuit in California v. Weinberger, 505 F.2d 767 (9th Cir. 1974), and the Fifth Circuit in Sears v. Gottschalk, 502 F.2d 122 (5th Cir. 1972), had construed this language in a manner similar to that in Robertson.

(b) Statute in question was 49 U.S.C. §1504, which provides in relevant part:

> "Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection.Whenever such objection is made, the Borad or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. . . ."

(c) The following factors were considered by the Supreme Court in Robertson:

  (i) The language of this exemption contains no "built-in" standard as in the case of the other exemptions.

  (ii) The legislative history of the FOIA discloses that Congress did not intend to repeal the many statutes (nearly 100) which restrict public access to specific government records.

  (iii) The Civil Aeronautics Board brought this particular statute to the attention of the House and Senate in the 1965 hearings, and no question or challenge was raised to the CAB's position that this statute came within this exemption.

  (iv) As a practical matter, the term "specific" cannot be read as applying only to documents specified, because Congress would be faced with "a virtually impossible task."

  (v) Neither the overall Congressional scrutiny of the FOIA in 1972 nor the FOIA amendments in 1974 changed this exemption.

2. Cases subsequent to Robertson

   (a) Accord, Citizens for a Better Environment v. Dept. of Commerce, 410 F.Supp. 1248 (N.D.Ill. 1976).

   (b) Cf. GTE Sylvania v. Consumer Product Safety Comm., 404 F.Supp. 352, 369-70 (D.Del. 1975).

3. Does 18 U.S.C. §1905 come within this exemption? No. This statute provides, in relevant part, for fine and imprisonment for anyone,

   ". . . being an officer or employee of the United States or of any department or agency thereof, [who] publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . ., which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. . . ."

   See Charles River Park "A," Inc. v. Dept. of H.U.D., supra 519 F.2d at 941 n.9; Sears, Roebuck & Co. v. General Services Admin., supra 402 F.Supp. at 381 n.3.

4. Apart from the question of statutory specificity, what is the relevance of the statute in question authorizing a disclosure as distinguished from authorizing a withholding? See Mobil Oil Corp. v. FTC, 406 F.Supp. 305, 309-11 (S.D.N.Y. 1976).

5. Can the records be "specifically exempted from disclosure by" regulation, based on a general authorizing statute, rather than by statute alone? I have found no reported cases on this point. Cf. Mobil Oil Corp. v. FTC, supra 406 F.Supp. at 310.

D. Exemption (4) -- "trade secrets and commercial or financial information obtained from a person and privileged or confidential"

1. This provision exempts only the following:

   (a) trade secrets;

   (b) commercial or financial information which is obtained from a person and is

      (i) privileged or

      (ii) confidential.

See Brockway v. Dept. of Air Force, 518 F.2d 1184, 1188 (8th Cir. 1975); Nat'l Cable Television Ass'n., Inc. v. FCC, 479 F.2d 183, 195 (D.C. Cir. 1973). For example, doctor-patient and lawyer-client privileged information, to the extent it is not commercial or financial, would not be within this exemption.

2. The person furnishing the records to an agency must request the agency to keep them confidential. See General Services Admin. v. Benson, 415 F.2d 878, 881-82 (9th Cir. 1969); Note, The Freedom of Information Act - The Parameters of the Exemptions - 62 GEO. L.J. 177, 188 (1973).

3. Records which are confidential in the hands of the agency to which they are initially furnished retain their confidentiality in the hands of all agencies to which they are subsequently furnished. See Grumman Aircraft Eng. Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970).

4. What is the meaning of "confidentiality"?

    (a) The "subjective test" would prohibit disclosure where the records would not customarily be released to the public by the person from whom they were obtained. See Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971).

    (b) The "objective test" would prohibit disclosure of commercial or financial records where such disclosure is likely to either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom they were obtained. See Nat'l Parks and Conservation Ass'n v. Morton, supra 498 F.2d at 765; Petkas v. Staats, supra 501 F.2d at 887. See also Note, Administrative Law - Freedom of Information - Commercial or Financial Information "Confidential" if Disclosure Would Impair Government Access to Information or Harm Competitive Position of Informant, 88 HARV. L. REV. 470 (1974).

    (c) Does the District of Columbia Circuit now require that both tests be met? Cf. Pacific Architects & Eng. Inc. v. Renegotiation Bd., 505 F.2d 383, 384 (D.C. Cir. 1974); Charles River Park "A," Inc. v. Dept. of H.U.D., supra 519 F.2d at 940.

    (d) Other Circuits

        (i) 2d Circuit -- Mobil Oil Corp. v. FTC, supra 406 F.Supp. at 312, follows Pacific Architects.

(ii) 4th Circuit --

(A) Westinghouse Electric Corp. v. Schlesinger, supra 392 F.Supp. at 1249-50 appears to follow Sterling Drug. Yet, reference is made therein to deducing labor costs from the information, whereby profit margin and resulting vulnerability to a competitor's price changes could be extrapolated.

(B) A later 4th Circuit case, Burroughs Corp. v. Schlesinger, supra 403 F.Supp. at 637, followed Nat'l Parks, but enjoined disclosure until a final decision was reached after hearings on the issue of "substantial harm" to Burroughs' competitive position.

(iii) 5th Circuit -- Continental Oil Co. v. FPC, 519 F.2d 31, 35 (5th Cir. 1975), followed Nat'l Parks in holding non-disclosure required by this exemption.

(iv) 6th Circuit -- McCoy v. Weinberger, 386 F.Supp. 504, 507 (W.D.Ky. 1974), followed Nat'l Parks in holding non-disclosure required by this exemption.

(v) 7th Circuit -- Porter County Chap. v. AEC, 380 F.Supp. 630, 636-37 (N.D.Ind. 1974), followed both Sterling Drug and Nat'l Parks (even before Pacific Architects did).

(vi) 8th Circuit -- Did not have an opportunity to consider this question in Brockway v. Dept. of Air Force, supra 518 F.2d at 1188-89.

(vii) 9th Circuit -- Save The Dolphins v. Dept. of Commerce, supra 404 F.Supp. at 411-12, and Hughes Aircraft Co. v. Schlesinger, 384 F.Supp. 292, 295-98 (C.D.Cal. 1974), followed Nat'l Parks in holding this exemption inapplicable and disclosure required.

5. What is the meaning of "privileged"?

Merely because information is "privileged" under this exemption does not mean it is necessarily "privileged" under Rule 26(b)(1) of the Federal Rules of Civil Procedure. See Pleasant Hill Bank v. U.S., 58 F.R.D. 97 (D.C.Mo. 1973). Cf. Kerr v. U.S. Dist.Ct. for Northern Dist. of Calif., 511 F.2d 192, 197-98 (9th Cir. 1975), cert. granted, 421 U.S. 987.

E. Exemption (5) -- "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"

1. The public is entitled to disclosure under this exemption of all memoranda and letters that a private party could discover in litigation with an agency, but those discovery rules can be applied only by way of rough analogies. See EPA v. Mink, supra 410 U.S. at 85-94. Cf. NLRB v. Sears, Roebuck & Co., supra 421 U.S. at 148-49.

2. Confidential intra-agency advisory opinions are exempt if their disclosure would be injurious to the consultative functions of government. See EPA v. Mink, supra 410 U.S. at 87; NLRB v. Sears, Roebuck & Co., supra 421 U.S. at 150-51.

3. Are "deliberative" memoranda exempt?

   (a) "Factual v. deliberative" approach -- Memoranda containing only purely factual material and purely factual material severable from a deliberative memorandum are not exempt. See EPA v. Mink, supra 410 U.S. at 87-91; Title Guarantee Co. v. NLRB, 407 F.Supp. 498, 502-03 (S.D.N.Y. 1975).

   (b) "Modified deliberative" approach -- Recommendations or opinions on legal or policy matters constitute a "deliberative" process, but disclosure under this exemption cannot necessarily be avoided by making this process dependent on whether or not a final agency decision will be reached, nor, if it will, by continuing this process indefinitely until a final decision is made by the agency. See Vaughn v. Rosen, supra 523 F.2d at 1144, 1146.

   (c) "Common sense" approach -- This exemption applies both to records of a "deliberative" nature and also to records which have nothing to do with the process of arriving at agency positions, but which would be available to a party in a general discovery proceeding; a "common sense" approach will be applied to both categories. See Brockway v. Dept. of Air Force, supra 518 F.2d at 1190-94.

   (d) "Pre- and post-decisional communications" approach -- Communications occurring after an agency has reached a final decision are not covered by this exemption, so long as communications prior to such decision and the "ingredients of the decisionmaking process" are not disclosed. See NLRB v. Sears, Roebuck & Co., supra 421 U.S. at 151-52; Renegotiation Bd. v. Grumman Aircraft Eng. Corp., supra 421 U.S. at 184; Mobil Oil Corp. v. FTC, supra 406 F.Supp. at 315.

4. If an intra-agency memorandum covered by this exemption is expressly adopted or incorporated by reference by the agency in what otherwise would be a final opinion, such a memorandum must be disclosed unless it falls under an exemption other than exemption (5). See NLRB v. Sears, Roebuck & Co., supra 421 U.S.at 161.

5. Five general principles applicable to this exemption are enumerated in U.S. v. J. B. Williams Co., Inc., 402 F.Supp. 796, 799 (S.D.N.Y. 1975).

6. The relationship between "executive privilege" and this exemption is discussed in NLRB v. Sears, Roebuck & Co., supra 421 U.S. at 150. In this connection, see the cases referred to under item X.A.3 hereinbefore.

7. An excellent article on this exemption appears in Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 HARV. L. REV. 1047 (1973).

F. Exemption (6) -- "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"

1. The clause "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" modifies "personnel and medical files" rather than only "similar files." See Dept. of Air Force v. Rose, supra ____ U.S. at _____, 48 L.Ed.2d at 26-27, 44 L.W. at 4508-09.

2. The judiciary has emphasized the "clearly unwarranted" language.

   (a) A confidential matter cannot be insulated from disclosure merely because it was stored by the agency in "personnel" or "medical" files; a balancing of interests must be struck between the protection of an individual's private affairs from unnecessary public scrutiny and the preservation of the public's right to governmental information. See Dept. of Air Force v. Rose, supra ____ U.S. at ___, 48 L.Ed.2d at 27-29, 32-33, 44 L.W. at 4509-12. Cf. Philadelphia Newspapers, Inc. v. Dept. of Justice, 405 F.Supp. 8, 10-11 (E.D.Pa. 1975).

   (b) This balancing test resolves an apparent conflict in the circuits. See Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135-36 (3d Cir. 1974).

   (c) In order to avoid nondisclosure under this exemption, must there be a public interest purpose, as distinct from the interest of a member of the public, for the disclosure? See Wine Hobby USA, Inc. v. IRS, supra 502 F.2d at 137.

3. Even if the records sought constitute "personnel" or "medical" or "similar" files, case summaries thereof may not constitute such files. See Dept. of Air Force v. Rose, supra _____ U.S. at _______, 48 L.Ed.2d at 30-31, 44 L.W. at 4510-11.

G. Exemption (7) -- "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel"

1. Prior to the 1974 Amendments to the FOIA, this exemption read: "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency".

2. What is the significance of the 1974 exemption (7) Amendment?

   (a) It reflects a Congressional intent to narrow the original version of this exemption and certain judicial decisions arising thereunder. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 164-65 (1975); Title Guarantee Co. v. NLRB, supra 407 F.Supp. at 504, 506-07; NLRB v. Hardeman Garment Corp., 406 F.Supp. 510, 512-13 (W.D.Tenn. 1975); Philadelphia Newspapers, Inc. v. Dept. of Justice, supra 405 F.Supp. at 11.

   (b) It underscores the insufficiency of general contentions of harm to the government's law enforcement activities. See Title Guarantee Co. v. NLRB, supra 407 F.Supp. at 504.

3. Subcategory (C) of this exemption - "an unwarranted invasion of personal privacy" - has been strictly construed. See Title Guarantee Co. v. NLRB, supra 407 F.Supp. at 505; Philadelphia Newspapers, Inc. v. Dept. of Justice, supra 405 F.Supp. at 12.

4. The applicability of subcategory (D) of this exemption (confidential source) requires an express assurance of confidentiality having been given to the source providing the information. See Title Guarantee Co. v. NLRB, supra 407 F.Supp. at 505; Mobil Oil Corp. v. FTC, supra 406 F.Supp. at 314; Philadelphia Newspapers, Inc. v. Dept. of Justice, 405 F.Supp. at 12.

5. This exemption protects only the government's interest, and a private party has no standing to assert it if the government explicitly waives its interest in this exemption. See Sears, Roebuck & Co. v. General Services Admin., supra 384 F.Supp. at 1004.

6. What is meant by "law enforcement purposes"?

   (a) Is not limited to criminal law enforcement. See Moore-McCormick Lines, Inc. v. I.T.O. Corp. of Baltimore, supra 508 F.2d at 949; Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974).

   (b) Does not include monitoring activities. See Sears, Roebuck & Co. v. General Services Admin., 509 F.2d 527, 529-30 (D.C. Cir. 1974). Contra, B & C Tires Co., Inc. v. IRS, 376 F.Supp. 708, 713 n.11 (D.C.Ala. 1974).

   (c) Is a distinction to be drawn between the decision-making process and law enforcement? See Philadelphia Newspapers, Inc. v. Dept. of Justice, supra 405 F.Supp. at 11-12.

   (d) Must law enforcement proceedings be contemplated or imminent at the time the disclosure is sought in order for this exemption to be applicable?

      (i) They must be contemplated, at least where no government sources or investigative techniques are endangered. See Moore-McCormick Lines, Inc. v. I.T.O. Corp. of Baltimore, supra 508 F.2d at 945. Cf. Black v. Sheraton Corp. of America, 371 F.Supp. 97, 102 (D.C.D.C. 1974).

      (ii) Need not be contemplated. See B & C Tire Co., Inc. v. IRS, supra 376 F.Supp. at 713 n.11.

      (iii) Need not be imminent. See Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, supra 502 F.2d at 373; Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73, 80-81 (D.C. Cir. 1974), supp. opinion, 511 F.2d 1347.

H. Exemption (8) -- "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions"

The only reported case even briefly discussing this exemption is M. A. Shapiro & Co. v. SEC, 339 F.Supp. 467, 469-70 (D.C.D.C. 1972), and this case sheds no light on the meaning and parameters thereof.

I. Exemption (9) -- "geological and geophysical information and data, including maps, concerning wells"

1. I have found two reported cases on this exemption.

   (a) County of Santa Barbara v. Kleppe, ___F.Supp.___ (C.D.Cal. 1976), 7 Environment Reporter, Current Developments, 541-42 (July 30, 1976), which held that geological data pertaining to the environmental impact of drilling for oil and gas in the Santa Barbara Channel is exempt from disclosure under this exemption.

   (b) In Pennzoil Co. v. FPC, supra 534 F.2d at 629-32, the FPC did not contest the fact that the records in question were encompassed by exemptions (9) and (4), and the issue before the court was under what circumstances would a disclosure of exempt FOIA records be prohibited.

2. There are at least four Department of the Interior decisions on this exemption. See Geological Survey, M-36739 (June 13, 1968); Appeals of Freeport Sulphur Co. and Texas Gulf Sulphur Co., M36779 (Nov. 17, 1969); Appeal of Amoco Production Co., M-36841 (Nov. 9, 1971); Appeal of J. M. Huber Corp., 79 I.D. 631 (1972).

3. There is virtually no legislative history on this exemption.

   (a) The Senate Committee reporting on the Senate FOIA bill commented on all of the exemptions except this one.

   (b) The House Committee reporting on the House FOIA bill did comment on this exemption, but its comments were meagre. See Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761, 801 (1967).

4. The following quote is an excerpt from Note, The Freedom of Information Act - The Parameters of the Exemptions, 62 GEO. L. J. 177, 206 (1973), which is the most informative article I have found on exemption (9):

> "No cases involving this exemption appear to have been reported. The Federal Power Commission relied on the exemption to deny a request by Ralph Nader for access to reports from the American Gas Association and reports of the Commission's independent reserve teams relating to a survey of natural gas reserves in the nation. Nader contended that the exemption was aimed at safeguarding underlying seismic data and geological maps, not estimates of reserves. The Federal Power Commission answered that it is precisely the seismic data and geologic maps that are essential to arrive at reserve estimates."

XI. What are the 1974 FOIA Amendments?

A. §552(a)(2): Tightened the requirement that each agency maintain and make available to the public current indexes identifying public information. An example page of such a current index from 41 Fed. Reg. 29720 (July 19, 1976) is attached hereto as Appendix B. See Merrill v. Open Mkt. Comm. of the Federal Reserve System, 413 F.Supp. 494, 505 (D.C.D.C. 1976).

B. §552(a)(3): Codifies case law interpreting the former FOIA language "request for identifiable records" as being a request which "reasonably describes such records."

C. §552(a)(4): This is a new subsection (4), and the old subsection (4) becomes new subsection (5).

1. Each agency must promulgate FOIA regulations.

2. The District Court for the District of Columbia is given jurisdiction in FOIA cases in addition to the U.S. district court for the district in which the complainant resides or has his principal place of business or in which the agency records are situated.

3. Case law permitting courts to examine agency records in camera to determine if any records or portion thereof are exempt from disclosure is codified.

4. An agency is required to answer or otherwise plead to an FOIA complaint within 30 days after service, unless the court "otherwise directs for good cause shown."

5. Courts may assess against the U.S. "reasonable attorney fees and other litigation costs reasonably incurred in any case[under the FOIA] in which the complainant has substantially prevailed." See Kaye v. Burns, 411 F.Supp. 897 (S.D.N.Y. 1976), which is the only reported case thereon that I have found, and which applied four criteria in the Senate bill in reaching its decision not to award attorney fees.

6. Where a court does issue such fees and costs, the court may find that questions are raised whether agency personnel acted arbitrarily or capriciously in withholding the records. Whereupon, the Civil Service must promptly initiate a proceeding to determine if disciplinary action is warranted against the officer or employee "primarily responsible" for the withholding.

D. §552(a)(6): This is a new subsection.

1. Within 10 days (excluding Saturdays, Sundays and legal public

holidays) after an agency's receipt of an FOIA request for records, the agency must "determine" if it will comply with the request. Immediately thereafter, it must notify the person requesting the disclosure of its decision, its reasons therefor, and, if the decision is negative, such person's right to appeal to the head of the agency.

2. A decision on appeal must be made within 20 days (excluding Saturdays, Sundays and legal public holidays) after receipt of the appeal.

3. In "unusual circumstances," which is defined in three lengthy categories, an agency itself may extend such 10- and 20-day periods up to an additional 10 working days by notifying the person requesting the disclosure thereof and its reasons therefor. Also, the following language appears to carve out another exception to these time limits:

> "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records."

4. Failure of an agency to comply with these time limits is an exhaustion of such person's administrative remedies.

5. Each denial of a request for records must set forth the names and titles or positions of "each person responsible for the denial. . . ."

E. §552(b)(1): This amended exemption (1), and this amendment is discussed on page 6 hereinbefore.

F. §552(b)(7): This amended exemption (7), and this amendment is discussed on page 14 hereinbefore.

G. §552(b): This added a sentence at the end of this subsection, which codified case law requiring that any reasonably segregable portion of an exempt record must be disclosed.

H. §552(d): This is a new subsection, which requires each agency to submit a report by March 1 of each calendar year, covering the preceding calendar year, to the Speaker of the House and the President of the Senate for referral to the appropriate Congressional committees. Each report must include all of the following:

1. the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

2. the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

3. the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

4. the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

5. a copy of every rule made by such agency regarding this section;

6. a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

7. such other information as indicates efforts to administer fully this section.

The Attorney General also must submit an annual report to Congress by March 1 of each calendar year relative to the cases that have arisen under the FOIA and the Department of Justice's efforts to encourage agency FOIA compliance.

I. §552(e): This is a new subsection, which expands the definition of "agency" as discussed in item 1 hereinbefore.

XII. What practical steps can be taken to induce and expedite an FOIA disclosure?

A. Emphasize the broad disclosure obligation inherent in the FOIA. See item III hereinbefore.

B. Make an agency establish its burden of proving that the records sought fall within one of the nine FOIA exemptions.

C. If none of these exemptions applies, argue that disclosure is mandatory.

D. Even if one or more of these exemptions applies, contend that disclosure is mandatory unless a statute, order, rule or regulation makes such disclosure mandatory or discretionary. See item IX.A hereinbefore.

E. If an order, rule or regulation makes such disclosure mandatory or discretionary, ascertain the statutory basis therefor.

F. Utilize the following features of the 1974 FOIA Amendments, which are discussed in item XI hereinbefore:

1. the more stringent time limitations (30 days) on an agency to answer or otherwise plead to an FOIA complaint;

2. the possibility that an agency can be assessed reasonable attorney fees and other litigation costs;

3. the right to obtain the names and positions of each person responsible for the refusal to disclose;

4. the possibility that disciplinary action can be taken against agency personnel primarily responsible for withholding disclosure;

5. the requirement that an agency must respond to the disclosure request within 10 days (some exceptions) and indicate its reasons for a refusal to disclose;

6. the annual Congressional FOIA reporting requirements.

G. If it is necessary to go to court to compel or expedite a disclosure, the D.C. Circuit probably would be your most sympathetic forum. Cf. Kramer and Weinberg, Freedom of Information Act, 63 GEO. L. J. 49 (1974).

XIII. What practical steps can be taken to prevent or delay a disclosure?

A. Be familiar with the disclosure-related statutes and regulations applicable to each agency with whom you have significant contact.

B. Prior to submitting to an agency any information which you feel falls within one or more of the FOIA exemptions, segregate the exempt information from that which is not, stamping an appropriate non-disclosure statement on the cover and on each page of the exempt portions. (The danger in this approach is that a failure to so stamp portions of any submitted information could preclude you from later successfully contending that such portions are exempt.)

C. Prior to submitting to an agency any information which you feel falls within one or more of the FOIA exemptions, attempt to obtain a written agreement from that agency, pursuant to any statute, order, rule or regulation making disclosure thereof mandatory or discretionary, not to disclose the information.

D. If you cannot get such an agreement, seek to obtain from the agency a written agreement whereby the agency will notify you by telephone and in writing at least five days prior to any disclosure of information submitted by you and which you have identified as being non-disclosable.

E. Make sure the agency's "FOIA officer" has a copy of each written agreement pertaining to non-disclosure of information submitted by you.

F. Upon being informed that an agency is prepared to disclose certain of the information submitted by you and which you feel is exempt from disclosure, and if no written non-disclosure agreement has been executed between you and the agency, attempt to convince the agency that specific FOIA exemptions apply, and that non-disclosure is mandatory under the FOIA, another statute, an order, rule and/or regulation or, if discretionary, that there are good reasons why the agency should use its discretion and not disclose in this instance (citing the specific reasons therefor).

G. Call to the attention of the agency employee initially charged with the decision of whether or not to disclose that his(her) decision is not final, that the person requesting the disclosure is entitled to appeal to the agency head, who presumably would be the person "primarily responsible" for any refusal to disclose.

H. If, despite your efforts, the agency intends to disclose this information, be prepared to move fast to petition a federal district court for a temporary restraining order and a preliminary injunction pending a decision on the merits. The D.C. Circuit probably would be your least sympathetic forum.

XIV. What is the relationship of the Privacy Act of 1974 (5 U.S.C. §552a) to the FOIA?

A. The Privacy Act became effective on September 27, 1975 and pertains to records about individuals such as criminal justice information, bank records, credit records, welfare records, military surveillance.

B. The emphasis is on privacy.

   1. Federal agencies must make public a description of each system of such records they maintain.

   2. These agencies are restricted in their disclosure of these records to other federal agencies and to others outside these other federal agencies.

   3. Individuals are given the right of access and challenge to those records containing information about them.

C. However, if disclosure is required under the FOIA (see 5 U.S.C. §552 (b)(6)), disclosure likewise is required under the Privacy Act. See 5 U.S.C. §552a(b)(2).

D. The following articles may be helpful in understanding the Privacy Act and its relationship to the FOIA:

   1. Symposium on the Privacy Act, 34 FED. B.J. 323-66 (1975);

   2. Hulett, Privacy and the Freedom of Information Act, 27 AD. LAW. REV. 275, 285-92 (1975);

3. Bigelow, The Privacy Act of 1974, 21 PRAC. LAW. 15 (Sept., 1975).

XV. What is the relationship of the State of Colorado's Open Records Act (§24-72-201 et seq., 1973 C.R.S.) to the FOIA?

A. The Open Records Act applies to "all public records" which are "made, maintained, or kept by the state or any agency, institution, or political subdivision thereof for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." See §§201 and 202(6).

B. Such records includes "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics." See §202(7).

C. Such records must be "open for inspection," which means that the inspecting person may request to be furnished "copies, print-outs or photographs" thereof, and the official custodian of such records may charge a reasonable fee therefor. See §§201 and 205.

D. Generally, any natural person, corporation, partnership, firm or association has the right to inspect such records, although the inspection of certain records is limited to "the person in interest." See §§201, 202(3), 202(4) and 204(3)(a).

E. Exceptions to this right of inspection:

1. "as otherwise specifically provided by law" (See §201. Cf. §§203(1) and 204(1)(a) and (b));

2. where "prohibited by rules promulgated by the supreme court or by the order of any court" (See §204(1)(c));

3. upon successful application of the "offical custodian" of the public record to the district court of the district in which such record is located for an order permitting him to restrict disclosure (See §§204(6) and 202(2));

   (a) The burden of proof is on the "official custodian" to show that the disclosure "would cause substantial injury to the public interest".

   (b) The hearing thereon must be held "at the earliest practical time".

4. discretionary non-disclosure in the case of certain enumerated records, "unless otherwise provided by law," if the disclosure "to the applicant would be contrary to the public interest"(See §204(2)(a));

5. mandatory non-disclosure in the case of certain enumerated records, "unless otherwise provided by law," but even some of these enumerated records must be available for inspection by "the person in interest" (See §204(3)(a)).

F. If inspection is denied, the person requesting the inspection of such records:

1. is entitled to receive "forthwith" a written statement of the grounds therefor, including "the law or regulation under which access is denied" (See §204(4));

2. may apply to the district court of the district "wherein the record is found" for a show cause order against the "custodian" (See §204(5)).

G. The following sanctions may be imposed against one who denies an inspection of public records:

1. upon a finding by the court that the denial by the "custodian" was "arbitrary or capricious," the custodian may be ordered "personally to pay the applicant's court costs and attorney fees in an amount to be determined by the court" (See §§204(5) and 202(1));

2. "any person who willfully and knowingly violates" the provisions of §§201 through 206, upon a misdemeanor conviction thereof, must be fined not more than $100 and/or imprisoned in the county jail for not more than 90 days (See §206).

H. I have found the following reported cases under the Colorado Open Records Act:

1. Denver Publishing Co. v. Dreyfus, 184 Colo. 288, 520 P.2d 104 (1974);

2. Cervi & Co. v. Russell, 184 Colo. 282, 519 P.2d 1189 (1974);

3. Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032 (1972);

4. Bd. of Cty. Comm'rs v. HAD Enterprises, Inc., ____ Colo. App. _____, 533 P.2d 45 (1974).

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54.

APPENDIX C

The following law review articles, collectively, are an excellent treatment of the Freedom of Information Act from 1967 to 1975:

1. Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761 (1967).
2. Note, Freedom of Information Act - The Parameters of the Exemptions, 62 GEO. L. J. 177 (1973).
3. Note, Freedom of Information Act: A Seven-Year Assessment, 74 COLUM. L. REV. 895 (1974).
4. Note, Freedom of Information Act Amendments of 1974: An Analysis, 26 SYR. L. REV. 951 (1975).

NEAP: Introduction and Current Developments

THE NATIONAL ENVIRONMENTAL POLICY ACT

INTRODUCTION & CURRENT DEVELOPMENTS

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Publications

"The Federal Law of Air Pollution Control," Lecture notes in Environmental Law, Continuing Legal Education in Colorado, Inc., (1975)

"Enforcement Under the Federal Water Pollution Control Act Amendments of 1972," 9 Land & Water Review 369 (1974) (coauthor)

"A Review of New Colorado Air & Water Pollution Legislation," The Colorado Lawyer, September, 1973 (coauthor)

"Colorado Appellate Procedure," printed in two parts, The Colorado Lawyer, May, 1973, June, 1973

"Utah Environmental Problems and Legislative Response," printed in two parts, 72 Utah L.Rev. 479, 73 Utah L.Rev. 1

"The Federal Water Pollution Control Act Amendments of 1972 - A Summary," The Colorado Lawyer, December, 1972.

Member

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Natural Resources and Administrative Law Sections

THE NATIONAL ENVIRONMENTAL POLICY ACT

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THE NATIONAL ENVIRONMENTAL POLICY ACT*

I. Introduction

A. Purposes

> "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. 4321

B. Declaration of National Environmental Policy

> "It is the continuing policy of the Federal Government...to use all practicable means and measures...in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations of Americans." 42 U.S.C. 4331(a)

C. Implementation

1) Environmental Impact Statements

The most important of the NEPA requirements dealing with implementation are the action forcing requirements of §102(2)(C) requiring all agencies of the Federal Government to:

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
>
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot by avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."
> 42 U.S.C. 4332

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* PL 90-190, 83 Stat. 852, 42 U.S.C. 4321 et seq. (1970)

2) §102(2) of NEPA also requires federal agencies to:

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures...which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

. . . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

. . . .

D. The Council on Environmental Quality

The remaining sections of NEPA created the Council on Environmental Quality (CEQ) and set forth the duties of that body. 42 U.S.C. 4341-4347. CEQ is an advisory agency and not a regulatory agency. It has no power to either approve or disapprove any federal actions. CEQ must analyze and interpret environmental trends, appraise the programs and activities of the federal government as they relate to environmental quality and recommend policies to promote environmental improvement. With respect to NEPA's impact statement requirements, CEQ must: (1) Issue guidelines to federal agencies for the preparation of EIS's. See 40 CFR 1500 and Section I.H. herein; (2) Assist agencies in preparing their own impact statement procedures. See Appendix A; (3) Consult with federal agencies concerning their implementation on NEPA's EIS requirements.

E. Role of the Environmental Protection Agency

Under §309 of the Clean Air Act, EPA must review and comment in writing on all actions subject to NEPA impact statement requirements that relate to any EPA authority, i.e. air and water pollution, solid waste, pesticides, radiation and noise. EPA must make such review public and determine whether the proposed federal action is environmentally satisfactory. If EPA finds a project environmentally unsatisfactory, it must further refer the matter to the CEQ.

F. Role of Federal Agencies

The various agencies of the federal government are the prinicpal implementors of NEPA's provisions. NEPA created no duties or responsibilities to be performed by state or local agencies, or by private industry or individuals. However,in many cases, these groups are intimately involved in the federal agency action and may be requested by the federal agency to prepare an environmental analysis as a precondition to taking the action requested of the federal agency.

Executive Order 11514 directed the agencies of the federal government to provide leadership in protecting and enhancing the quality of the environment and to take measures needed to direct their policies, plans and programs so as to meet national environmental goals. In response to this mandate and to comply with the CEQ Guidelines, the various federal agencies published regulations concerning the preparation of environmental impact statements. See Appendix A.

G. The CEQ Guidelines

Executive Order 11514 called on CEQ to "issue guidelines to federal agencies for the preparation of detailed statements on proposals for legislation and other federal actions affecting the environment." In response to this directive, CEQ published "Guidelines for Statements on Proposed Actions Affecting the Environment" on April 23, 1971. The Guidelines have been subsequently revised and codified at 40 CFR 1500 "because they affect state and local governmental agencies, environmental groups, industry and private individuals, in addition to federal agencies to which they are specifically directed" and, therefore, must be "widely and readily available." The courts have generally considered the Guidelines as merely advisory and have said that "the CEQ has no authority to prescribe regulations governing compliance with NEPA." Greene County Planning Board v. FPC, 455 F.2d 412 (2nd Cir., 1972) cert. denied, 409 U.S. 849. However, in deciding NEPA cases, the courts have generally given weight to the interpretations of NEPA by the CEQ Guidelines.

1) EIS Procedures

The Guidelines encourage agencies to undertake initial assessments of the environmental impacts of proposed action concurrently with initial technical and economic studies. Based on the environmental assessment, an agency may decide to prepare a draft EIS or a negative determination pursuant to 40 CFR 1500.6(e). If a negative determination is prepared and is not challenged, the project may proceed. If the agency decides to prepare an EIS, it must inform the public of this decision. A draft EIS must be prepared and circulated in accordance with the requirements set forth in the Guidelines. 40 CFR 1500.8. To the greatest extent practicable no administrative action subject to the EIS requirements should be taken sooner than 90 days after the draft statement has been circulated for comment, furnished to CEQ, and made available to the public. Nor should administrative action be taken sooner than 30 days after the final EIS has been made available. In some cases, where the final EIS is circulated within 90 days of circulation of the draft EIS, the 90 day period and the 30 day period may overlap and may run concurrently. 40 CFR 1500.11(b)

2) Negative Determinations

Courts have required that negative determinations and a record supporting the determination be made for all major federal actions for which it is determined not to prepare an EIS. Hanley v. Mitchell, 460 F.2d 640 (2nd Cir., 1972) cert. denied, 409 U.S. 990 (1972) (Hanley II) Hanley v. Kleindienst, 471 F.2d 823 (2nd Cir., 1972), cert denied, 412 U.S. 908 (1973). While the Guidelines adopted the negative determination requirement, they provided little guidance as to the record required in support of a negative determination. In Nader v. Butterfield, 373 F.Supp. 1175 (D.D.C. 1974) the court established in more detail the type of documentation that must be prepared, including a statement of reasons for the negative declaration which must show:

a) that the agency took a "hard look" at the situation;
b) that the agency identified all the relevant environmental factors;
c) that, after identifying and studying the issues, the agency has convincingly demonstrated that any impact is not significant.

The concept of the negative determination is a popular one. All agencies but one that have promulgated NEPA regulations have adopted the concept of the negative determination.

3) Review of Draft EIS's

The Guidelines require that the draft EIS be circulated for comment to the "federal and federal-state agencies with jurisdiction by law or special expertise with respect to any environmental impact involved" and that the agency make a public announcement of the availability of the draft EIS and make it available to the public. 40 CFR 1500.9

The necessity to obtain and consider the comments received on the draft EIS prior to preparation of a final impact statement was recognized by the 10th Circuit in National Helium v. Morton, 486 F. 2d 995 (1973).

Ten copies of the draft EIS and five copies of all comments must be sent to CEQ. 40 CFR 1500.11(a). Ordinarily, CEQ does not review or comment on draft EIS's. However, under §309 of the Clean Air Act, EPA is required to comment on virtually every draft and final EIS. EPA has established the following rating system for draft EIS's based on an analysis of the environmental impacts of the action and the adequacy of the statement:

Environmental Impact of the Action
LO--Lack of Objections
ER--Environmental Reservations
EU--Environmentally Unsatisfactory

Adequacy of the Impact Statement
1--adequate
2--insufficient information
3--inadequate

The effect of EPA review was taken into consideration by the U.S. District Court for the District of Colorado in Sierra Club v. Morton, 379 F.Supp. 1254 (1974). In that case, the court noted that the EPA comments which listed eleven subjects on which the draft statement was deemed by EPA to contain lack of information but which did not use the term "unsatisfactory" did not constitute a finding by EPA that the proposed action to construct a thermal electric power plant was unsatisfactory from the standpoint of public health or welfare or environmental quality. Hence, it was not necessary to publish a finding to that effect or to refer the matter to CEQ.

4) Hearings on Draft EIS's

Although NEPA does not require the holding of hearings which the agency does not otherwise hold, §7(d) of the CEQ Guidelines provides:

> "Agency procedures shall also specifically include provision for public hearings on major actions with environmental impact, whenever appropriate, and for providing the public with relevant information, including information on alternative courses of action. In deciding whether a public hearing is appropriate, an agency should consider: (1) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved; (2) the degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held; (3) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; and (4) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action."

Agencies have been indifferent to this requirement. Some have adopted criteria for determining when hearings should be held, while others have not.

5) The Final Environmental Impact Statement

Preparation of the final EIS consists of appropriately revising the draft EIS to include a discussion of significant opposing professional views and responsible opinions not covered in the draft EIS. All substantive comments received on the draft EIS, or summaries of these comments if the response has been exceptionally voluminous, must be included in or attached to the final EIS. 40 CFR 1500.10(a). Subsection (b) of this section sets forth the distribution requirements of the final EIS which include distribution to CEQ, all federal, federal-state, state and local agencies, private individuals that made substantive comments on the draft, individuals who requested a copy of the final statement, the applicant and the EPA. EPA reviews each final EIS to which it gave unfavorable ratings upon review of the draft. Except under limited circumstances, final agency action may not be taken sooner than 30 days after publication in the Federal Register of the CEQ notice of receipt of the EIS. A draft or final EIS may be amended or supplemented at any time. However, if the changes are substantial, further hearings or recirculation of the document may be necessary.

II. The Environmental Impact Statement Process

A. Circumstances Requiring an Impact Statement

§102(2)(C) requires the preparation of a detailed statement for "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." This requirement presents several threshold questions, namely, whether an action is federal, major, and significantly affects the environment.

1. "Federal Action"

The courts have held the slightest federal connections with the action to be sufficient. There have been very few cases in which a lack of federal action was found. For example, in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) the court held that approval by the Bureau of Indian Affairs of a lease of Indian lands to a developer was sufficient federal action to trigger the substantive and procedural mandates of NEPA. See also, Kitchen v. FCC, 464 F.2d 801 (D.C.Cir.,1972).

2) "Major Actions & Significant Effects"

There has also not been much controversy over whether a proposed federal action is a "major action significantly affecting the human environment." Courts have tended to construe this requirement very liberally. An examination of some of the cases that have been exceptions is instructive.

For example, in Citizens Organized to Defend the Environment v. Volpe, 353 F.Supp. 520 (S.D.Ohio, 1972) the court attempted to provide general guidance for the terms "major" and "significantly affecting the quality of the human environment." The court said a major federal action "is one that requires substantial planning, time, resources, or expenditure." To have "significant effects" the court said an action must be one"that has an important or meaningful effect directly or indirectly upon any of the many facets of man's environment." The court then applied these general definitions to the facts before it and concluded that approval by the Secretary of Transportation of specifications governing a mining company's transfer of a large strip mine machine across a federal highway wasn't a major federal action and that it would not have a significant affect on the environment.

Other cases have attempted to provide general guidance as to the meaning of these terms, see Hanley v. Kleindienst, 460 F.2d 640 (2nd Cir., 1972) however, none of the general tests appear very useful and cases usually are decided on the facts. Such was the case in Platte Area Reclamation Committee v. Bringar, U.S.Dist.Ct. Colo. #74-M-756 (Sept. 27, 1974) 7 ERC 1285, which dealt with reconstruction of the 15th Street Bridge in downtown Denver. Therein the court concluded that the Federal Highway Administration expenditure of $450,000 at the request of the City of Denver for replacement of the original bridge that was destroyed by a flood with no change in design, location or right of way is not a major federal action significantly affecting the quality of the human environment. See also, Viavant v. Trans-Delta Oil & Gas Co., 7 ERC 1423 (10th Cir., Nos. 74-1115 and 1116, November 27, 1974. Not printed in F.2d)

3) "Recommendations or Report on Proposals"

Prior to SCRAP II (Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975)) these threshold words of the statute were largely ignored by the courts. In that case, the Supreme Court somewhat incidentally stated:

> "...the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a proposal for federal action." (original emphasis)

Later, in Kleppe v. Sierra Club, ____ U.S. ____ (1976), the Supreme Court directly considered the question of whether a report or recommendation on a proposal for major federal action existed. In that case, the Sierra Club claimed that the Department of Interior had an obligation under NEPA to prepare a comprehensive or programmatic EIS on issuing coal leases, approving mining plans and other actions enabling public utilities to develop coal reserves on federally owned land in the Northern Great Plains Region (embracing parts of Wyoming, Montana, North & South Dakota). The court found no evidence in the record of an action or proposal for an action of regional scope and held that absent an overall plan for regional development, it was impossible to prepare an EIS.

4) Programmatic Environmental Impact Statements

The CEQ Guidelines, supported by case law, recognize that in some instances, related actions and projects are in effect a major federal action and require a comprehensive evaluation to determine their cumulative impact. Such related actions and projects are termed "programs" and the accompanying evaluations are "programmatic EIS's." The Guidelines state that actions which are related geographically, generically, or as part of a chain of contemplated projects (e.g. major lengths of highways, as opposed to small segments) will often require preparation of broad programmatic statements. 40 CFR 1500. 6(d)(1).

There has been one Tenth Circuit case that considered the necessity of preparing a programmatic EIS. In Sierra Club v. Stamm, 507 F.2d 788 (1974) the court found that the EIS on one of six units composing the Central Utah Project was sufficient and that a programmatic or comprehensive EIS was not required because the unit had independent utility and could operate separately from the remaining unconstructed units of the project.

Until the Supreme Court decided Kleppe v. Sierra Club, ____ U.S.____ (June 28, 1976), Scientists Institute for Public Information v. A.E.C. 481 F.2d 1079 (D.C.Cir., 1973) was the most detailed and analytical opinion on programmatic EIS's. In that case, Judge Skelly Wright considered the issue of whether a defined program of research and development conducted by the AEC on the liquid metal fast breeder reactor required preparation of a programmatic EIS. The court ordered the AEC to prepare an EIS on the entire program, even though an individual statement had been prepared for the one existing fast breeder demonstration plant and even though the AEC planned to issue an individual EIS for each future plant included in the program. The court set forth four criteria to be analyzed to determine whether the time was ripe for the preparation of a programmatic statement. The factors to be considered were identified as (1) the likelihood and imminence of the program's coming to fruition; (2) the extent to which information is available on the effects of implementing the expected program and on alternatives thereto; (3) the extent to which irretrievable commitments are being made and options precluded as the development of the program progresses; (4) and the severity of the environmental effects should the action be implemented.

In Kleppe v. Sierra Club, supra, the Supreme Court was faced with a somewhat similar set of circumstances. In response to a growing number of private applications to mine the coal reserves of the Northern Great Plains Region, the Interior Department, together with other federal, state and local agencies began a series of studies that culminated in 1972 with initiation of the Department of Interior's Northern Great Plains Resources Program. Early in 1973, the Secretary of Interior announced a partial moratorium on issuance of coal prospecting and leasing permits pending preparation of a nationwide coal programmatic impact statement. In addition to this programmatic EIS, Interior had prepared or was in the process of preparing impact statements on individual subparts of mining and leasing activities in the Northern Great Plains Region. One of these impact statements was a multi-project statement on the Powder River Coal Basin, a region in Wyoming in which the richest coal deposits of the Northern Great Plains were located.

The Plaintiffs brought suit in June of 1973 seeking preparation of an EIS on the Northern Great Plains Region and issuance of an injunction against agency actions relating to coal development and exploration in the Region. The District Court denied relief. The Court of Appeals, in a split opinion written by Judge Skelly Wright, reversed. The Court of Appeals read the record to show that Defendants were contemplating regional federal action to control coal development and remanded to the District Court to determine whether the contemplated federal action was so near fruition as to be considered a proposal, and if so, to order preparation of a regional EIS. Judge Wright relied on the four part test that he had developed in Scientists Institute for Public Information v. A.E.C., supra. The Supreme Court reversed.

As will be discussed later, the principal basis for the Supreme Court's reversal was that no recommendation or proposal for federal action existed upon which to write an EIS. However, the court went on to analyze the necessity for and scope of a programmatic EIS. First, the court recognized that NEPA "may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time." More specifically, it stated:

> "Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate difference courses of action."

The court, however, rejected the Plaintiff's contention that all proposed coal related actions in the Northern Great Plains Region were so related, as to require a single comprehensive EIS. The court noted that the Interior Department was not adverse to preparing a regional EIS but that the determination of scope of the region was for the agency and not the plaintiffs to decide. The court stated that resolving such issues "requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies." As to the cumulative environmental impacts the court noted that such factors require a comprehensive statement but again deferred to the discretion of the agency to determine the extent and effect of these factors.

The opinion in this case certainly leaves one with a negative impression of the Supreme Court's attitude toward NEPA. The court ignored six years of judicial construction of §102(2)(C)'s ambiguous meaning. Perhaps the court's lack of respect for established NEPA law is the most important message of the case.

5) Standard of Review

The question of the standard of judicial review which the courts should apply in determining whether a federal agency's threshold determination not to file an EIS has caused considerable controversy. At least two different standards have been used.

a) Rule of Reasonableness

The standard adopted by the 10th Circuit is one of"reasonableness." In Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973) the court stated:

> "Under the specific terms of NEPA we feel that the proper standard...is whether the negative determination was reasonable in the light of the mandatory requirements and high standards set by the statute...." 484 F.2d 1249.

b) "Arbitrary and Capricious"

In Hanley v. Kleindienst, supra, the second circuit adopted the more commonly employed "arbitrary and capricious" standard in review of administrative actions. While this test is more favorable for the federal agency than the "reasonableness" test, its application in Hanley was nevertheless onerous because the court required a full administrative record against which it would apply the test.

The question of which standard of review is correct may have been settled by the Supreme Court in Sierra Club v. Kleppe, supra. Although the question of standard of review was not an issue in that case, the court referred a number of times to the necessity of showing "arbitrary action" by the agency in order for the respondents to prevail.

6) Limits on NEPA's Applicability

a) Incompatible Statutes

§102 of NEPA has been interpreted to mean that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. Flint Ridge Development Co. v. Hills, ___ U.S. ___ (1976) rev'g. 520 F.2d 240 (10th Cir., 1975). The Supreme Court, in Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP I), 412 U.S. 669 (1973), noted that "NEPA was not intended to repeal by implication any other statute." In Flint Ridge, the Supreme Court reversed the 10th Circuit opinion requiring HUD to prepare impact statements in carrying out its responsibilities under the Interstate Land Sales Full Disclosure Act (ILSA). The ILSA requires that a registration statement filed by a developer to be effective automatically 30 days after filing unless the Secretary acts affirmatively within that time to suspend it for inadequate disclosure. 15 U.S.C. 1706. The court noted that it was inconceivable that an EIS could be drafted, circulated, commented on, reviewed and revised into final form within the 30 day period. The court found that the Secretary had no legal authority to suspend an effective date in order to allow HUD time to prepare an impact statement. The court held NEPA's impact statement requirement inapplicable under these circumstances.

b) National Security and Military Actions

Courts have traditionally been reluctant to interfere in military and national security matters. While no court has held these matters totally exempt from NEPA, at least a limited exemption appears to exist. The facts in each case are usually determinative. Perhaps the most restrictive interpretation of NEPA concerning military and national security matters is found in McQueary v. Laird, 449 F.2d 608 (10th Cir.1971). There the plaintiffs challenged the storage of chemical and biological warfare agents at the Rocky Mountain Arsenal. While the case did not directly involve whether or not an EIS should be prepared, it is significant in that the court held:

> "Public disclosure relating to military-defense facilities creates serious problems involving national security. We hold that NEPA does not create substantive rights in the plaintiffs-appellants here to raise the environmental challenge in regard to the Rocky Mountain Arsenal. In its proprietary military capacity, the Federal Government has traditionally exercised unfettered control with respect to internal management and operation of federal military establishments." 449 F.2d 612.

It is doubtful that this early NEPA decision would be the same if litigated today. However, many other NEPA cases concerning military/national security matters indicate some limitations on NEPA exist in such matters. (e.g. Neilson v. Seaborg, 348 F.Supp. 1369 (D.C.Utah C.D. 1972).

c) Temporary or Emergency Actions

The conflict encountered in these areas is the incompatibility between time required to prepare an EIS and the need for expeditious action. See, Cohen v. Price Commission, 337 F.Supp. 1236 (S.D.N.Y. 1972), SCRAP II, supra. There have not been many cases in these areas and the cases do not show any definite trend.

d) The Environmental Protection Agency Exemption

EPA has consistently argued that it should not be required to file impact statements because it is the agency of the federal government that has as its sole mission the protection of the environment and that it above all agencies will consider the environmental consequences of its actions. On the other hand, environmentalists and industry have argued that EPA is subject to error and shortsightedness just like any other agency; that EPA should be subject to the public and full disclosure requirements of NEPA like other agencies; and that NEPA applies equally to all agencies and does not contain any exceptions.

The courts have been sympathetic to EPA's arguments and have established at least a limited exemption for EPA from NEPA. There have been a number of cases on this issue, notably two 10th Circuit cases. In Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir.1973), Anaconda claimed that the EPA had not complied with NEPA by failing to prepare an EIS before it proposed or promulgated a regulation as part of a State Implementation Plan under the Clean Air Act Amendments of 1970. The court recognized that the EPA is not exempt from weighing and considering the environmental effects of its regulation and concluded that "no doubt it will fully weigh and consider these factors." The court held that to require EPA to prepare an EIS would "only serve to frustrate the accomplishment of the Act's objectives."

More recently, in Wyoming v. Hathaway, 525 F.2d 66 (10th Cir.1975) consumers of pesticides used in predator control brought action against EPA to enjoin it from taking further action in enforcing an order which suspended and cancelled registration of three pesticides used in predator control. The Court of Appeals held that the administrative and judicial procedures of the Federal Insecticide, Fungicide and Rodenticide Act provided an adequate method of review, particularly in view of agency consideration of a report which was substantially equivalent to an EIS.

Finally, Congress also gave EPA an express limited exemption from the application of NEPA to certain of its actions under the Federal Water Pollution Control Act. §511(c) thereof provides:

> "(c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act, and the issuance of a permit under section 402 of this Act for the discharge of any pollutant by a new source as defined in section 306 of this Act, no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969."

B. Who Prepares the Environmental Impact Statement

1) Lead Agency

§102(2)(2) requires that impact statements be prepared by a responsible federal official of the federal agency undertaking a project requiring an EIS. Because many federal actions require multiple federal approvals or the direct participation of several agencies, the CEQ Guidelines recommend that a "lead agency" prepare a single EIS on the cumulative significant impact of the entire action. In NRDC v. Callaway, 389 F.Supp. 1263 (D.C.Cir. 1974) it was held that selection of an agency to write an EIS where there is overlapping jurisdiction should turn on the time sequence in which agencies become involved, the magnitude of their involvement, and their relative expertise concerning the environmental effects of the project.

The problems inherent in the "lead agency" concept were demonstrated in Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir.,1971), vacated, 93 S.Ct. 458 (1972), 500 F.2d 17 (1974). In that case, the Economic Development Administration (EDA) of the Department of Commerce offered a grant of nearly four million dollars to a New Mexico county to construct a road through a national forest. EDA did not prepare an impact statement on this action and was challenged by the Upper Pecos

Association for failure to do so. Immediately thereafter, the U.S.Forest Service exercised lead agency jurisdiction and prepared an EIS on the project. The trial court and the 10th Circuit found the Forest Service to be the lead agency and, thus, the proper agency to prepare the EIS. Upper Pecos petitioned for and was granted *certiorari.* Thereafter, EDA prepared an EIS and requested the Supreme Court to declare the issue moot. On remand to the trial court, Upper Pecos argued that the EIS was issued after the grant decision was made and that the EIS was nothing more than a justification of the action. It specifically requested that the court declare the grant void ab initio. The trial court did not agree, nor did the 10th Circuit which rather curiously stated:

> "Since we believe EDA *timely prepared*, *although belatedly*, an environmental impact statement no case or controversy now exists."(emphasis added) 500 F.2d 19.

If the original decisions of the lower courts that the Forest Service was the proper lead agency and that the EIS was adequate had stood, EDA would have escaped its duty to analyze the environmental consequences of its actions involved in giving the grant. The EDA EIS had to consider the alternative of grant or no grant, hence road or no road, whereas the Forest Service EIS was written on the assumption that the road would be built, the only alternatives which it could consider were where the road was to be located.

2) Delegation of Responsibilities

The issue of the extent of delegation of a federal agency's responsibilities under NEPA has been a very controversial issue. In *Green County Planning Board v. FPC*, 455 F.2d 412, *cert.denied* 409 U.S. 849 (1972) the Second Circuit ruled that FPC reliance on an EIS prepared by a license applicant did not comply with NEPA. Because the Supreme Court refused certiorari it was thought this issue was resolved. However, the Federal Highway Administration (FHWA) continued to delegate responsibility for preparation of the draft EIS to state highway agencies "in consultation with the FHWA." The U.S.Courts of Appeals split on the issue of whether such delegation complied with NEPA. The 10th Circuit in *Citizens Environmental Council v. Volpe*, 484 F.2d 870 (10th Cir.1973) *cert.denied* 416 U.S. 936 (1974), joined the 4th, 5th, 8th and 9th Circuits in upholding FHWA's delegation. By denying all petitions for certiorari, the Supreme Court refused to resolve the issue. However, Congress took action to resolve the issue in 1975 by passing PL 94-83 amending §102(2)(D) of NEPA to provide that an EIS:

> "...for any major Federal action funded under a program of grants to States shall not be deemed legally insufficient solely by reason of having been prepared by a State agency or official if: (i) the State agency or official has statewide jurisdiction and has the responsibility for such action, (ii) the responsible Federal official furnishes guidance and participates in such preparation, (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and (iv)... the responsible Federal official provides early notification to, and solicits the view of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity, and if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement."

It must be noted, however, that the amendment does not authorize federal rubber stamping of a state agency prepared EIS. Undoubtedly, the degree of agency participation required by (ii) and (iii) will be litigated in the future. See, Conservation Society of Southern Vermont v. Secretary of Transportation, ____ F.2d ____ (2nd Cir.1976).

Congress authorized an even greater delegation of NEPA responsibilities than that above in §101(h) of the Housing & Community Development Act of 1974, 42 U.S.C. 5304(h) (1974). This Section authorized the Department of Housing & Urban Development (HUD) to require local government applicants to assume all NEPA responsibilities in connection with block grants for urban renewal projects. The HUD regulations implementing this authorization go so far as to state in 24 CFR 58.30(a):

> "Persons and agencies seeking redress in relation to environmental assessments covered by an approved certification shall deal with the applicant and not with HUD. It shall be the policy of HUD, following the approval of a certification, not to respond to inquiries and complaints seeking such redress, and only to refer such inquiries and complaints to the applicant and the certifying officer of the applicant."

The regulations do not require HUD supervision of an applicant's performance of NEPA responsibilities and state that neither HUD nor the Justice Department will participate in any litigation concerning NEPA responsibilities. The validity of these HUD regulations was challenged and upheld in Ulster County Community Action Committee v. Koenig, 402 F.Supp. 986 (S.D.N.Y.,1975).

C. Timing of Preparation of the Environmental Impact Statement

When to prepare an EIS is an issue that has been heavily litigated. The early cases generally took the position that the earlier the better. This position grew out of the recognition that NEPA required strict compliance and that it was safer to err on the side of being too early rather than too late and that an EIS was to be used as a decision-making tool. Among these cases is Clavert Cliffs v. AEC, 449 F.2d 1109 (D.C. Cir., 1971), cert.denied 404 U.S. 942 (1972) wherein the court held that the AEC could not defer preparation of an EIS until after certain hearings on projected nuclear power plants. It said the EIS must "accompany the proposal through the existing agency review process." This could only be accomplished if the EIS were prepared at the earliest possible time.

Timing aspects become very difficult where federal research projects are concerned because it may be impossible to draft an EIS in the early stages of a project because of lack of information, on the other hand, by the time that commercial feasibility is demonstrated and the effects of the technology are certain it is too late and the purposes of NEPA are thwarted. The leading case in this area is Scientists Institute v. AEC, 481 F.2d 1079 (D.C.Cir. 1973). That case dealt with government research on the liquid metal fast breeder reactor. The court held that a detailed EIS concerning the program was necessary in view of the magnitude of the on-going federal investment in the fast breeder reactor program, the controversial environmental effects attendant upon future widespread deployment of breeder reactors should the program fulfill present expectations, the accelerated pace under which the program had moved beyond pure scientific research toward creation of a viable, competitive breeder reactor electrical energy industry and the manner in which investment in the new technology was likely to restrict future alternatives.

The Supreme Court has also considered the question of timing in SCRAP II, supra. The court said that an EIS must be prepared at the time that an agency makes a recommendation or report on a proposal for federal action. In that case, the court faced a unique set of facts. The nation's railroads had filed a proposal with the ICC to raise freight rates, including rates on recyclable scrap materials. Concurrently, the ICC was investigating the entire rate structure--including its environmental effects--in a separate proceeding. As part of its consideration of the rate increase, the ICC prepared a very cursory draft impact statement, followed 7 months later by an abbreviated "environmental report" released with the commission's decision approving the increases. The plaintiffs sought to enjoin the decision, which prompted the ICC to write new draft and final impact statements and to reconsider the decision. When the commission later reaffirmed its initial decision, the plaintiffs challenged the adequacy of the commission's environmental assessment and statements.

In reviewing the ICC's environmental statements, the Supreme Court observed that two draft statements had already been prepared and suggested that the environmental implications of the rate increases were minimal and temporary. It found the other proceeding--the investigation of the rate structure--to be the more "appropriate" one for considering the broad environmental issues, such as effects of freight rates on recycling incentives, raised by the plaintiffs. It concluded that the shorter statements for the rate increase proceeding were adequate in light of the potential environmental effects involved, the narrow scope of the proceeding, and the broader concurrent investigation of environmental aspects of the freight rate structure.

Procedurally, the Court held that the ICC's final impact statement was not due until the commission issued a "report or recommendation" on a "proposal for federal action." Since the ICC's "report" was its initial decision on the railroad's proposed rate increase, the Court excused the commission's failure to prepare a final statement in time for hearings which preceded the "report," noting that a draft statement was available. The holding has raised the question whether some federal licensing agencies may defer preparation of final statements until a hearing board issues a report or recommendation.

More recently, in Sierra Club v. Kleppe, supra, the court again considered the question of timing. It stated that "the mere 'contemplation' of certain action is not sufficient to require an impact statement." In a note, the court said:

> "At some points in their brief, respondents appear to seek a comprehensive impact statement covering contemplated projects in the region as well as those that already have been proposed. The statute, however, speaks solely in terms of proposed actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statements on proposed actions. Should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects."

It is noteworthy that although the Supreme Court has apparently taken a more restrictive view than the courts of appeal, in both Sierra Club and SCRAP II the court addressed itself to the timing of a final EIS. In both cases the court recognized that §102(2)(C) imposed other duties on an agency prior to its making a report or recommendation on a proposal for action. For example, in Kleppe v. Sierra Club, supra, the court stated:

> "The section states that prior to preparing the impact statement the responsible official "shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." Thus, the section contemplates a consideration of environmental factors by agencies during the evolution of a report or recommendation on a proposal. But the time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption."

CEQ has taken the position that the process of preparing and circulating draft statements relates not to the agency review requirement, but to the consulting requirement in §102(2)(C). Memorandum from CEQ to Heads of Agencies, dated November 26,1975.

D. Impact Statement Adequacy

§102(2)(C) sets forth the basic requirements for preparation of an EIS. It calls for a "detailed statement" on the "environmental impact" of the proposed action, any "adverse environmental effects" which cannot be avoided should the project be carried out, "alternatives" to the proposed action, the "relationship between local short term uses" of man's environment and the "maintenance and enhancement of long term productivity" and any "irreversible and irretrievable commitments of resources "if the proposed project is carried out."

There have been a large number of cases over the issue of the adequacy of the EIS once it is prepared. One standard that has been adopted by a number of courts is the "full disclosure" standard enunciated in *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. (E.D.Ark.,1971), *aff'd*.470 F.2d 289 (8th Cir.1972), *cert. denied*, 412 U.S. 908 (1975). There the court noted:

> "At the very least NEPA is an environmental full disclosure law... The 'detailed statement' required by §102(2)(C) should, at a minimum contain such information as will alert the President, the Council on Environmental Quality, the public and, indeed, the Congress, to all known possible environmental consequences of proposed agency action." 325 F.Supp.759.

This case and other cases adopting the "full disclsoure" standard make it clear that compliance requires disclosure of all relevant facts in a manner understandable by those who have to make the decisions on the proposal and those who will be affected by the decisions.

A number of 10th Circuit cases have discussed the issue of adequacy of an EIS. In National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973) the court held that judicial review of a final environment statement was limited to whether all five procedural requirements contained in §102(2)(C) were discussed, whether it constituted objective good faith compliance with the demands of the Act and whether it contained a reasonable discussion of the subject matter involved in the five areas. The court specifically rejected the arbitrary and capricious standard of review and adopted the "rule of reason" requiring objective good faith compliance. The court made it clear that the "rule of reason:"

> "should not be viewed as necessitating that the completion of an impact statement be unreasonably or interminably delayed in order to include all potential comments or the results of works in progress which might shed some additional light on the subject of the impact statement. Such a result would often inordinately delay or prevent any decision in environmental cases. The courts should look for adequacy and completeness in an impact statement, not perfection." 486 F.2d 1004

1) Environmental Impact of the Proposed Actions

§102(2)(C)(i) requires that the EIS discuss the environmental impacts that will result as a consequence of the proposed action. In E.D.F. v. Corps of Engineers, supra, the court held that the impact statement prepared by the Corps did not "set forth all of the environmental impacts which are known to the defendants by their own investigations or which have been brought to their attention by others."

2) Adverse Environmental Effects

§102(2)(C)(ii) also requires that an EIS discuss fully "any adverse environmental effects which cannot be avoided should the proposed action be implemented." Failure to disclose fully and objectively adverse environmental consequences of a stream channelization project in NRDC v. Grant, 341 F. Supp. 356 (E.D.N.C.,1972), 355 F.Supp. 280 (E.D.N.C.,1973) resulted in the Soil Conservation Services' EIS being ruled inadequate. In that case, the EIS had set forth some of the project's environmental consequences that were unavoidable and adverse, but it failed to discuss them adequately. The court said it was not enough to merely note that the project would increase the amount of sediment carried downstream. The court held that the EIS must also analyze and discuss the downstream effects of increased sedimentation. National Helium v. Morton, supra, also dealt in part with an agency's failure to adequately discuss adverse environmental effects of the proposed action.

3) Discussion of Alternatives

The analysis of alternatives required by §102(2)(C)(iii) is particularly critical to the adequacy of the EIS because it is through this analysis that mitigating measures may be discovered. Perhaps the leading case on discussion of alternatives is NRDC v. Morton, 458 F.2d 827 (D.C.Cir.,1971) where the court held that agencies cannot disregard alternatives simply because they "do not offer a complete solution to the problem." The fact that some reasonable alternative would require congressional action is not sufficient to place it beyond the scope of the required discussion. Under NRDC v. Morton, an agency must explore all reasonable alternatives whether or not those alternatives are within the agency's area of competence or statutory authority. The court emphasized that only those alternatives that were reasonably available need be considered, however the discussion of those alternatives must not be superficial. A thorough examination of every reasonable alternative must be made. On a similar vein the 10th Circuit in National Helium v. Morton, supra, stated "the statement does not have to dwell on the imaginary horribles posed by the plaintiffs."

4) Short-term Uses vs. Long-term Productivity and Irreversible and Irretrievable Commitments of Resources

Subsection (iv) of 102(2)(C) requires consideration of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. Subsection (v) requires examination of any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Neither of these requirements have played a major or determinative role in any similar case. The Interior Department's alleged failure to consider the effects of its action on future energy needs in terminating contracts for the purchase and delivery of helium was an issue addressed in National Helium v. Morton, supra. In Environmental Defense Fund v. Corps of Engineers,supra,the court found the EIS inadequate because the Corps failed to "adequately bring to the reader's attention all irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." Subsection (iv) has been interpreted not to require a dollar and cents weighing of the costs and benefits in the EIS. Sierra Club v. Morton, 510 F.2d 813 (5th Cir.,1975). The requirements of §102(2)(C)(iv) and (v) were also considered by the court in Minnesota Public Interest Research Group v. Butz, 401 F.Supp. 1276 (D.Minn. 1975).

The first generation of NEPA cases concerned the question of whether an EIS was necessary. These cases generally involved "legal" issues. However, as the trend of environmental cases under NEPA increasingly moves into the second generation of cases, where the issue is the adequacy of the EIS, environmental lawyers will become more involved in highly complex,factually oriented cases. This has several implications: this phase of NEPA cases is presenting some of the more difficult and highly technical litigation presently in the courts. These cases require a great amount of expertise, time and financial resources. Second, more and more frequently EIS's involve areas where the technical "state of the art" is not highly sophisticated, thus requiring a lot of guesswork and resulting in more general and speculative EIS's. It will become correspondingly more difficult to challenge the adequacy of EIS's of this nature. Third, a similar development will probably take place in those instances where it will be necessary to analyze the social consequences and/or the cost benefits of the proposal. As NEPA cases become more "factually" oriented, the importance of the trial judge's "factual" findings will become more and more important.

Finally, a Third Generation of cases is appearing in the horizon. In these cases, the substantive decision of the agency is challenged in light of the information and recommendations contained in the EIS. The growing trend is to attack the agency's substantive decision at the same time that the EIS prepared in connection with the decision is challenged. Examples of recent cases using this approach are: *National Wildlife Federation v. Morton*, 393 F.Supp. 1286 (D.D.C. 1975) (Agency's decision to permit off-road vehicles on public lands and EIS thereon rejected.) *Concerned About Trident v. Schessinger*, 400 F.Supp. 454 (D.D.C. 1975) (Trident project and EIS thereon upheld.)

APPENDIX A

Agency NEPA Procedures

Department of Agriculture (USDA)
  Departmental -- 39 FR 18678 (1974).
  Agricultural Stabilization and Conservation Service (ASCS) -- 7 CFR 799 (1974).
  Animal and Plant Health Inspection Service (APHIS) -- 39 FR 3696 (1974).
  Farmers Home Administration -- 41 FR 22255 (1976).
  Forest Service -- 39 FR 38244 (1974).
  Rural Electrification Administration -- 39 FR 23240 (1974).
  Soil Conservation Service -- 7 CFR 650 (1974), amended, 39 FR 43993 (1974), 40 FR 10951 (1975).
Appalachian Regional Commission -- 36 FR 23676 (1971).
Canal Zone Government -- 41 FR 18360 (1976).
Central Intelligence Agency (CIA) -- 39 FR 3579 (1974).
Civil Aeronautics Board (CAB) -- 14 CFR 312, 40 FR 37182 (1975), amended, 40 FR 59425 (1975).
Department of Commerce
  Departmental -- 40 FR 5175 (1975).
  Coastal Zone Management -- 15 CFR 925, 40 FR 8546 (1975).
Department of Defense (DOD) -- 32 CFR 214 (1974).
  Army -- 40 FR 55962 (1975).
  Corps of Engineers -- 33 CFR 209.410 (1974).
Delaware River Basin Commission -- 18 CFR 401.51 (1974).
Environmental Protection Agency (EPA)
  Nonregulatory actions -- 40 CFR 6 (1975).
    Manual for Preparation of Environmental Impact Statements for Wastewater Treatment Works, Facilities Plans and 208 Areawide Waste Treatment Management Plans (EPA June 1974).
  New Source NPDES Permits -- Proposed: 40 FR 47714 (1975).
  Regulatory actions -- Statement of Policy, 39 FR 16186 (1974). Procedures for Voluntary Preparation, 39 FR 37419 (1974).
  Section 309 Review -- EPA Manual, Review of Federal Actions Impacting the Environment (1975).
Energy Research and Development Administration (ERDA) --10 CFR 11 (1974), amended, 40 FR 8795 (1975).

Federal Communications Commission (FCC) -- 47 CFR 1.1301 et seq. (1974), amended, 40 FR 53393 (1975).

Federal Energy Administration (FEA) -- 10 CFR 208, 41 FR 4722 (1976).

Federal Power Commission (FPC) -- 18 CFR 2.80 (1972), amended, 39 FR 15946 (1973).

Federal Trade Commission (FTC) -- 16 CFR 1.81 -- 1.85 (1971).

General Services Administration (GSA)

Departmental -- GSA Order Adm. 1095.1, 40 FR 15131 (1975).

Public Buildings Service -- GSA Order PBS 1095, 40 FR 27733 (1975).

Department of Health, Education, and Welfare (HEW) -- HEW General Administration Manual -- chs. 30-10 through 30-16 (1973).

Food and Drug Administration (FDA) -- 21 CFR 6 (1973), amended, 40 FR 16663, 23035, 31606 (1975), 41 FR 21768 (1976).

Department of Housing and Urban Development (HUD)

General -- HUD Dept. Handbook 1390.1, 39 FR 19182 (1973), amended, 39 FR 38922 (1974). Proposed amendment to HUD Dept. Handbook 1390.1: 41 FR 17506 (1976).

Community Development Blcok Grants -- 24 CFR 58 (1975), amended, 40 FR 22253, 29992 (1975), 41 FR 20522 (1976).

Department of Interior

Departmental -- 36 FR 19343 (1971).

Bonneville Power Administration -- 37 FR 815 (1972).

Bureau of Indian Affairs -- Interim Guidelines: Environmental Quality Handbook, 30 BIAM Supp. 1, (Aug. 29, 1973).

Bureau of Land Management -- BLM Manual 1790 (6/13/74), 1791 (6/17/74), 1792 (3/15/76), 1793 (8/1/74).

Bureau of Mines -- 37 FR 2895 (1972).

Bureau of Outdoor Recreation -- 37 FR 6501 (1972).

Bureau of Reclamation -- Reclamation Instructions, Series 350, Pt. 376, Ch. 5, (1/12/72), amended 11/6/72, 10/12/73.

Fish and Wildlife Service -- Bureau Transmittal Memos (Aug. 12, 1974 & Nov. 8, 1974).

Geological Survey -- 37 FR 5263 (1972).

National Park Service-- Guidelines (July 29, 1974).

Interstate Commerce Commission (ICC) -- 49 CFR 1100.250 (1972). Proposed: 40 FR 37233, 50108 (1975).

Department of Justice
  Law Enforcement Assistance Administration (LEAA) -- 28 CFR 19 (1974).
Department of Labor
  Occupational Safety and Health Administration (OSHA) -- 29 CFR 1999 (1974).
National Aeronautics and Space Administration -- 14 CFR 1204.11 (1974).
National Capital Planning Commission -- 36 FR 23706 (1971), amended, 37 FR 16039 (1972).
National Science Foundation -- 45 CFR 640 (1974).
Nuclear Regulatory Commission (NRC) -- 10 CFR 51 (1974), amended, 40 FR 8774, 8790 (1975).
Department of State
  Departmental -- 37 FR 19167 (1972).
  Agency for International Development (AID) -- Proposed: 41 FR 12896 (1976).
  International Boundary and Water Commission -- 39 FR 9868 (1974).
Tennessee Valley Authority (TVA) -- 39 FR 5671 (1974).
Department of Transportation (DOT)
  Departmental -- 39 FR 35232 (1974)
  Federal Aviation Administration (FAA) -- FAA Order 5050.2A, 40 FR 36516 (1975).
  Federal Highway Administration (FHWA) -- 23 CFR 771 (1974), amended, 40 FR 60052 (1975), 41 FR 9321 (1976).
  Coast Guard -- Commandant Instruction 5922.10B, 40 FR 49383 (1975), amended, 40 FR 52430 (1975).
  Urban Mass Transportation Administration -- DOT Order 5610.1, 37 FR 22692 (1972).
  National Highway Traffic Safety Administration -- 49 CFR 520, 40 FR 52395 (1975).
  Saint Lawrence Seaway Development Corporation -- 40 18026 (1975).
Department of the Treasury -- 39 FR 14796 (1974).
  Internal Revenue Service -- 36 FR 15061 (1971).
Veterans Administration (VA) -- DVB Circular 27-75-37, 40 FR 37126 (1975).
Water Resources Council -- 36 FR 23711 (1971).
Postal Service -- 39 CFR 775 (1972), amended, 40 FR 26511 (1975).

Development on Federal Lands

DEVELOPMENT ON FEDERAL LAND

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DEVELOPMENT ON FEDERAL LAND

Hamlet J. Barry III

I. Scope of Topic

Discussion of general mineral development on federal land, with emphasis on coal, but some attention to other leasable minerals. Will not cover locatable minerals, except insofar as they are leasable on acquired lands under Acquired Lands Mineral Leasing Act, 30 U.S.C. 351-359. Although any mineral development will almost invariably deal with air and water pollution problems, these concerns are treated by other papers as part of this Institute. Similarly, nearly all mineral development on federal land will have to consider NEPA--also treated in another paper. In addition, non-mineral type developments on federal lands (i.e., ski areas, logging operations, grazing, and urban type developments) are treated only in passing and insofar as they are subject to the general regulations cited here.

II. Political Climate and Introduction

It has long been assumed that states welcome increased federal regulatory activity on federal land. Recent remarks by Governors and federal officials indicate that, at least in the West, this is not so; "states rights" has taken on a new and legitimate meaning, and implications are great for mineral development on federal land in the future. Western states will resist almost any increase in federal power or jurisdiction in the mining area.

The past few years have seen changes in the general direction of some federal legislation or programs--toward a sharing of regulatory authority, or toward granting of authority to states. For example, both clean air and clean water acts permit and encourage state enforcement and administration. The trend is toward increasing state involvement, with federal blessing, over activities on federal lands. The Federal government will continue to have exclusive control over how one obtains title, right or lease for minerals on federal lands, but states will have increasing role on what happens thereafter as to air, water, roads, mining methods, planning, zoning and reclamation.

III. Jurisdictional Issues--Who Controls Development on Federal Land?

A. Federal Government generally maintains that they have "Plenary constitutional authority over the retention, management, and disposition of public land;" that any conflicting state laws must yield to federal law, and that states may not interfere with the unlimited power of the federal government to pass laws and administer the property of the U.S.

B. States are increasingly inclined to disagree with some portions of the above federal assertion, generally maintaining that states are sovereign over all lands within their borders, and that federal statutes, rules, and regulations concerning the public domain do not necessarily override conflicting state laws.

C. There is little doubt that the acquisition of a mineral lease on federal land is controlled by federal statute and regulation under federal proprietary powers. Relevant statutes are the Mineral Leasing Act of 1920 (30 U.S.C. 181 et seq.); the Acquired Lands Mineral Leasing Act of August 7, 1947 (30 U.S.C. 351-359) and the recently passed, vetoed and veto overriden S. 391, Federal Coal Leasing Amendments Act of 1975 (veto overriden August 4, 1976).

As to Locatable Minerals, the Mineral Location Law of 1872 (17 Stat 91) remains the basic authority. The law recognizes the mining camp doctrine that mineral deposits on the public domain belong to the person first discovering the deposits, and sets forth minimal federal procedures which establish the principle of appropriation by discovery, dimensions of a claim, marking and identifying of a claim, and the rights of the claimant prior to patent. State laws not in conflict with federal laws are applicable, and generally serve to implement the basic federal requirements.

D. Practical Aspects of The Jurisdiction Question: What Permits are Required?

Following acquisition of a mineral lease on federal land, an operator is subject to a number of both federal and state requirements, with little discernable logical division of authority. Particularly as to regulation of surface mining, the federal government has left a vacuum which has historically been filled by states. It is unsafe to assume that because a mineral development is on federal land, only federal permits are required; it is equally unsafe to assume that because the land is subject to state sovereignty, only state permits and regulations must be followed. In fact, a mixture of permits is required. For example, a hypothetical mine operator, seeking to surface mine coal on federal land in Colorado, is subject to the following permit requirements:

1. State Requirements:

   (a) Colorado Division of Mines:

   Operators Notice of Activity (CRS 1973 34-47-123)--required when work is commenced or stopped at any mine, mill, placer, quarry, open pit mine, dam project, tunnel or excavation.

   License to Operate Coal Mine. CMI form 34. Fee required, plus monthly reports to Colorado Division of Mines.

   License to Store, Transport and Use Explosives (CRS 1973 34-27-101 through 110; 34-47-103 and 104).

   NOTE: All the above permits are required regardless of land or mineral ownership.

   (b) Colorado Land Reclamation Board:

   Under H.B. 1065 (1976), the Mined Land Reclamation Act, several things are required of mine operators on all lands within the state:

After June 30, 1976, new mine operations must obtain a Mining and Reclamation permit. Mines with permits under 1973 statute are encouraged to convert their old permit to a new permit.

Special permits are required for small scale operations (10 acres or less or 70,000 tons per year or less), and for operations which will be complete in 10 days or less.

Bonds are required for both prospecting and Reclamation.

The general permit requirements are extensive; Special permits are less so. General permits under 34-32-112 require the following:

(1) Five copies of the application;

(2) A reclamation plan submitted with each of the applications;

(3) An accurate map of the affected land submitted with each of the applications;

(4) The application fee;

(5) The legal description and area of affected land;

(6) The owner of the surface of the area of the affected land;

(7) The owner of the substance to be mined;

(8) The source of the applicant's legal right to enter and initiate a mining operation on the affected land;

(9) The address and telephone number of the general office and the local address and telephone number of the applicant;

(10) The detailed description of the method of mining to be employed;

(11) The size of the area to be worked at any one time;

(12) The timetable estimating the periods of time which will be required for the various stages of the mining operation.

(13) The reclamation plan shall be based upon provisions for, or satisfactory explanation of, all general requirements for the type of reclamation proposed to be implemented by the operator. Reclamation shall be required on all the affected land. The reclamation plan shall include:

(i) A description of the types of reclamation the operator proposed to achieve in the reclamation of the affected land, why each was chosen, and the amount of acreage accorded to each;

(ii) A description of how the reclamation plan will be implemented to meet the requirements of section 34-32-116;

(iii) A proposed timetable indicating when and how the reclamation plan shall be implemented;

(iv) A description of how the reclamation plan shall rehabilitate the affected land. This description shall include, but not be limited to, natural vegetation, wildlife, water, air, and soil.

(v) A map of all of the proposed affected land by all phases of the total scope of the mining operation. It shall indicate the following:

(14) The expected physical appearance of the area of the affected land, correlated to the proposed timetables required by paragraph (h) of subsection (2) of this section and paragraph (c) of this subsection (3); and

(15) Portrayal of the proposed final land use for each portion of the affected lands.

(16) The accurate map of the affected lands shall:

(i) Be made by a registered land surveyor, professional engineer, or other qualified person;

(ii) Identify the area which corresponds with the application;

(iii) Show adjoining surface owners of record;

(iv) Be made to a scale of not less than one hundred feet to the inch and not more than six hundred sixty feet to the inch;

(v) Show the name and location of all creeks, roads, buildings, oil and gas wells and lines, and power and communication lines on the area of affected land and within two hundred feet of all boundaries of such area;

(vi) Show the total area to be involved in the operation, including the area to be mined and the area of affected land;

(vii) Show the topography of the area with contour lines of sufficient detail to portray the direction and rate of slope of the affected land in question;

(viii) Indicate on a map or by a statement the general type, thickness and distribution of soil over the area in question, including the affected land;

(ix) Show the type of present vegetation covering the affected land.

17. The reclamation plan shall also show by statement or map the depth and thickness

of the ore body or deposit to be mined and the thickness and type of the overburden to be removed.

18. A basic fee of fifty dollars and, in addition, a fee of fifteen dollars per acre for the first fifty acres, ten dollars per acre for the second fifty acres, five dollars per acre for the third fifty acres, and one dollar per acre for any additional acres shall be paid. In no case shall the permit fee exceed two thousand dollars.

In addition to the above general permit, the Colorado Land Reclamation Board requires the filing of a notice to conduct prospecting operations. The notice requires fairly extensive information from the applicant, as set forth in 34-32-113.

2. Federal Requirements. In addition to the above state requirements, a surface mine operator will be required to file or comply with the following federal requirements:

(a) U.S. Geological Survey--Area Mining Supervisor.

Operators holding valid leases are required to file and obtain approval for a mining and reclamation plan. Requirements for the plan are detailed and extensive, and are found in the newly promulgated 43 CFR 3041 and 30 CFR 211 regulations. U.S.G.S. has prepared model mining and reclamation plan for informational use by operators.

Prior to engaging in activity on the leased land, operators must identify archaeological and historic sites, and evaluate effect of proposed operations on these sites, if any.

IV. Constitutional Analysis--Jurisdictional Issues.

The obstacle course of duplicating and conflicting permits described above is symptomatic of the underlying, unresolved constitutional issues. The greatest problem is with mining and reclamation permits. Operators subject to dual permits and enforcement, with the possibility of conflicting reclamation standards, have a legitimate complaint. A brief constitutional analysis of this jurisdictional conflict follows.

A. Supremacy Clause and Pre-emption.

The Supremacy Clause (Art. IV of Const.) is the source of the pre-emption doctrine. In order to find pre-emption, the state and federal laws must be in conflict, and explicit or implicit Congressional intent to pre-empt must be found. Recent rulings have strengthened the holding that pre-emption cannot simply be inferred from the comprehensive character of the federal provisions. See Goldstein v. California 512 U.S. 542.

1. Pre-emption and the Mineral Leasing Act. Does the Mineral Leasing Act pre-empt application of all state mining and reclamation laws to federal land? There is no clear intention to pre-empt; in fact, sections 189 and 187 of the act specifically preserve state rights. See 30 U.S.C. 187 and 189. Secondly, at least two cases have said the Mineral Leasing Act does not pre-empt state law. Hagood v. Heckers 513 P2d 208 (Colo. 1973) and Texas Oil and Gas v. Phillips Petroleum 27u F. Supp 366 (W.D. Okla 1967), aff'd per curim 406 F2d 1303 (10th Cir. 1969).

B. Types of Federal Land. Although it is not widely recognized or followed, there are two types of federal land for jurisdiction purposes. "Article I" land comes from Article I, Section 8 of the Constitution, wherein Congress is granted the power "to exercise exclusive legislation" over Washington D.C. and assorted forts, arsenals, etc. "Article IV" land comes from Article IV, Section 3, wherein Congress is given power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The Article I property power is contained within the list of enumerated powers; Article IV powers are not listed among the enumerated powers. Article IV land is generally classed as the public domain.

1. Based on the above distinction, the argument is that any Congressional action under Article IV powers are acts of a proprietor only; such acts cannot supercede state laws. Case Law establishes that the federal proprietor has somewhat larger authority than a private person to (a) protect federal lands, (b) establish rules for transfer of title to federal land, and (c) enjoy immunity from state taxation. However, unless Congress acts pursuant to an enumerated power, and unless Congress intends to preempt conflicting state law,

the federal law will not override the state provisions. As a proprietor, the federal government clearly can condition the use of its lands by specifying reclamation standards or mining methods, but in so doing they cannot supplant existing state laws.

2. It is clear that Congress could enact a law under its enumerated powers which would pre-empt all state jurisdiction over mining on federal lands. So far they have not done so, and in the absence of other intent, any legislation dealing with Article IV land only must be presumed to be enacted pursuant to Congress' proprietary powers. Absent such Congressional action and intent, the following observation is pertinent.

"If Congress, or its delegate, were to lease a tract of the public domain to a corporation to strip-mine for minerals for commercial use or sale, there is no reason why state law could not be applied to prohibit, or to impose various conditions upon, the strip mining activities of the lessee. If the contrary view is common in practice today, it is only because states have yielded to the mistaken assertions of federal government lawyers and failed to examine constitutional principles sufficiently to detect the error and to make the implications of those principles plain." (Engedahl, Plowshare Legal Studies, NTIS, PB-231-015 Vol. II, p. 261.)

C. Recent Developments.

1. Legislative Action.

In 1975, Congress passed major legislation to control strip mining. H.R. 25, the Surface Mining Control and Reclamation Act of 1975, like its predecessor, S. 425, was vetoed by President Ford. Had H.R. 25 been signed, it would have made major concessions to state control over federal land. Congress found:

> ...(e) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this act should rest with the states.

In H.R. 25, Congress adopted a basic scheme under which minimum federal reclamation standards for federal, state, and private land could be exceeded by more stringent state standards. In such event, the state law would apply to federal land, as well as to state and private land:

> Each state in which there is, or may be, conducted surface coal mining operations, and which wishes to assume exclusive jurisdiction over the regulation or surface coal mining and reclamation operations..., shall submit to the Secretary...a state program which demonstrates that such State has the capability of carrying out the provisions of this Act...

> Any provision of any State law or regulation ...which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operations than do the provisions of this Act...shall not be construed to be inconsistent with this Act.

Since the demise of H.R. 25 by failure to override the Presidential veto, attempts have been made to resurrect a federal strip mine bill by providing for reclamation on federal land only. Cognizant of the major differences this change in scheme would bring, the proposed legislation provided a mechanism for uniform reclamation standards on state and private lands and federal lands:

> (c) The requirements of this title and the Federal lands program shall be incorporated by reference or otherwise in any Federal mineral lease, permit, or contract issued by the Secretary which may involve surface coal mining and reclamation operations. There

> shall also be incorporated into any such lease, permit, or contract the requirements of any State law regulating surface coal mining in the State in which the Federal lands involved are located, if the Secretary finds that the requirements of the State law provide for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this title and the regulations issued by the Secretary pursuant to this title.
>
> (e) The Secretary may enter into an agreement with a State to provide for a joint Federal-State program covering a permit or permits for surface coal mining and reclamation operations on non-Federal and Federal lands which are interspersed or checkerboarded and which should, for conservation and administrative purposes, be regulated as a single management unit. To implement a joint Federal-State program the Secretary may enter into agreements with the States, may delegate authority to the States, or may accept a delegation of authority from the States for the purposes of avoiding duality of administration of a single permit for surface coal mining and reclamation operations. Such an agreement may only be entered into with a State that has a State law regulating surface coal mining which the Secretary has found, pursuant to subsection (c) of this section, provides for the regulation of surface coal mining and reclamation operations on non-Federal lands in accordance with the requirements of this title and the regulations issued by the Secretary pursuant to this title.

As of this writing, it is unclear what action, if any, Congress will take in regard to mined land reclamation. No strip mine or reclamation bills were made law in 1976. The various Congressional proposals make it clear that Congress recognizes (1) the need for uniformity of federal and state reclamation enforcement within any given state, and (2) the desire of some states to administer and enforce their own standards on federal, state, and private land. It is equally clear, however, that Congress does not intend to give states veto power over Federal coal development and that Congress does not always recognize the constitutional distinction between the two types of federal property power discussed in IV, B, above.

2. Executive Actions.

(a) Draft Regulations.

Soon after the pocket veto of the first strip-mine bill, the Department of Interior issued the first draft of proposed federal coal mine operating regulations. Most observers belive the issuance of such regulations was an attempt to reduce support for renewed attempts at Congressional strip mine legislation. In any event, the January 1975 draft proposals of the 30 C.F.R. 211 regulations omitted any reference to the application of state law to federal land. After extensive discussion and comment, the coal mine operating regulations were reissued, again as proposed regulations. In this instance, the proposed regulations specifically addressed the question of jurisdiction and control of reclamation on federal lands. The proposed regulations provided:

> Sec. 211.74 Application of State laws, regulations, practices, and procedures as Federal law by Federal officers.
>
> (a) Upon request of the Governor of any State, the Secretary shall promptly review the laws, regulations, administrative practices and procedures in effect, or due to come into effect, with respect to reclamation of lands disturbed by surface mining of coal, subject to the jurisdiction of that State, to determine whether such controls may appropriately be applied as Federal law to operations relating to coal owned by or subject to the jurisdiction of the Unit4d States. He shall take into account all relevant constructions and applications of such controls by competent State and local judicial and regulatory authorities, the desirability and practicability of uniformity between Federal and State controls, and the public policy of the State regarding the development of coal resources located therein.

> (b) After such review, the Secretary may, by order, direct that all or part of such State laws, regulations, practices, and procedures shall be applied as Federal law by the authorized officers of the Department with respect to coal within that State owned by or subject to the jurisdiction of the United States, if he determines that such application would (1) effectuate the purposes of this Part; (2) result in protection of environmental values which is at least as stringent as would otherwise occur under exclusive application of Federal controls; and (3) would be consistent with the interest of the United States in the timely and orderly development of its coal resources.

The significance of the proposed change as to the application of state law was not lost on state officials, environmentalists, or federal legislators. Nearly all commented unfavorably on proposed section 211.74. About half the Western states submitted comments critical of the proposed section on application of state law.

(b) Final Regulations.

The final version of the regulations made significant change in this area from the September draft. While neither the states nor the Department of Interior will concede the ultimate constitutional argument on control of federal land, the final version of the regulations allegedly will permit the states as much control over federal land as possible, given the Department of Interior assertions of general and complete plenary authority over the federal lands. The Federal regulations issued May 17, 1976, 30 F.R.C. 211 and 43 C.F.R. 3041, now provide as follows:

Applicability of State Law

> Section 211.75: (a) On the effective date of this Part, and from time to time thereafter, the Secretary shall direct a prompt review of State laws and regulations in effect, relating to reclamation of lands disturbed by surface mining of coal in each State in which Federal coal has been leased, permitted, or licensed. If, after such review, the Secretary determines that the requirements of the laws and regulations of any such State afford general protection of environmental quality and values at least as stringent as would occur under exclusive application of this Part, he shall, by rulemaking, direct that the requirements of such State laws and regulations thereafter be applied as conditions upon the approval of any proposed exploration or mining plan, unless
>
> (i) the Secretary determines that such application of the requirements of such laws and regulations would unreasonably and substantially prevent the mining of Federal coal in such State, and
>
> (ii) the Secretary determines that it

is in the overriding national interest that such coal be produced without such application of such requirements. In any such determination of overriding national interest, the Secretary will consult in advance of such determination with the Governor of the State involved.

(b) On the effective date of this Part, the Secretary will direct representatives of the Department to consult with appropriate representatives of each State or a number of States for the purpose of formulating and entering into agreements to provide for a joint Federal-State program with respect to surface coal mining reclamation operations for administrative and enforcement purposes. Such agreements shall, wherever possible, provide for State administration and enforcement of such programs, provided that Federal interests are protected. Any such agreement shall be entered into by rulemaking and shall have as its principal purpose the avoiding of duality of administration and enforcement of reclamation laws governing surface coal mine reclamation operations.

3. Review of State Law and Negotiations concerning Cooperative Agreements.

(a) As of late summer, 1976, Interior had begun a review of state reclamation laws, pursuant to 211.75 (a) above. Notice to this effect is found in The Fed. Register on July 7, 1976. It is anticipated that North Dakota, Wyoming, and Montana laws will pass the stringency test set forth in the federal regulations. All others will probably fail.

(b) As of late summer, 1976, Interior had issued initial guidelines and criteria for cooperative agreements under 211.75 (b). Preliminary negotiations between states and federal officials have apparently not gone well; states feel that BLM has not lived up to the promises made in the regulations (i.e. "such agreements shall, wherever possible, provide for state administration and enforcement") and has little intent to allow exclusive state control over mining on federal land. Apparently no cooperative agreements are presently under serious negotiation, and the dual administrative, enforcement, and reclamation standard problem remains.

4. Recent Developments -- Litigation.

(a) Kleppe v. New Mexico, U.S. Supreme Court, June 17, 1976. This case seriously undercuts some of the constitutional analysis above in IV, A and IV, B. The facts in the case are that New Mexico authorities rounded up and sold wild horses and burros on federal BLM land, in contravention of a federal statute protecting wild burros. New Mexico argued, and the lower court agreed, that the federal statute was unconstitutional and an excessive use of power under Congress' Article IV (proprietary) property powers. The lower court said that under Article IV powers the federal government can protect the public lands, but it has no power to override state livestock laws simply because some horses and burros roam on federal land.

The Supreme Court reversed the lower court, saying their reading of the Article IV property clause was too narrow. The court said:

> The power over the public lands thus entrusted to Congress is without limitations....
>
> In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain....
>
> And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supreme Clause....

> We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding.

While much of the above is dicta, there is no doubt that the Court either disagreed with the type of analysis presented in IV. A. and IV. B. above, or did not have that type of analysis presented to it by New Mexico. We have postulated that when Congress acts under Article IV powers only, the resulting legislation has no authority to override state law. The Kleppe decision, however, says that even where Congress acts only as a proprietor, its dictates are supreme. New Mexico argued that upholding the federal statute would sanction an impermissible intrusion upon state sovereignty, and under this new ruling, any Congressional mandate--proprietary or legislative--will require conflicting state law to recede. The case is a significant setback for those who argue that state sovereignty over the public domain should not be destroyed by managerial acts of Congress acting in its proprietary capacity.

(b) Wyoming v. Kleppe. U.S. District Court, Wyoming. In June, 1976, Wyoming filed suit in Federal District Court, seeking a declaratory judgment that the 30 C.F.R. 211 and 43 C.F.R. 3041 reclamation regulations (discussed briefly above) are an impermissible intrustion on Wyoming sovereighty, and are therefore of no effect in Wyoming. A three-judge panel was requested by the plaintiffs, but has been denied. The Defendant Department of Interior has moved to dismiss the complaint, and argument on the motion has been set for September 21, 1976.

5. Conclusions -- Jurisdictional Issues.

I have spent considerable time discussing the state vs. federal jurisdictional issue because it is obviously crucial to the question of who controls development on federal land. Although the answer to the question is far from clear, it is apparent that both the state and federal government will play major roles in federal land development. Both levels of government profess a desire to avoid dual standards or dual administration for mining operations, but thus far neither level will sacrifice very much to avoid the dual enforcement problem.

A final solution could come with definitive legislation from Congress, but this does not appear likely at this point. Cooperative agreements between states and federal officials would ameliorate the duality problem but not solve the constitutional issues. The most predictable occurrence -- piecemeal litigation -- may eventually resolve the issue, but with some confusion and slippage before the division of authority becomes clear. At least for the near future, clients must be advised that control over development on federal land is a now-you-see-it-now-you-don't proposition, with both states and feds asserting their respective -- and occasionally conflicting -- positions.

V. Coal Development on Federal Lands -- 1976 Update.

In 1976, major and substantial changes took place in the rules, regulations and policies regarding the development of federal coal. The changes have come both from

Congress and from the executive, and each are considered below.

A. Department of Interior Changes in Coal Policy.

Since his installation as Secretary of the Interior, Thomas Kleppe has established the resumption of Federal Coal activity as a high priority goal. On January 26, 1976, Kleppe formally lifted the moratorium on federal coal leasing (Secretarial Order No. 2952, February 13, 1973), and announced the implementation of a new policy, which has been under study and development for some years. Each element of the policy is considered herein.

1. Adoption of the Energy Minerals Activity Recommendation System (EMARS)

   (a) EMARS is described by the Department of Interior as "...a procedure by which the various offices of the several federal atencies involved in coal leasing, in cooperation with state and national policy considerations, and input from the general public to provide recommendations to the Secretary on where, when, and how much coal should be offered for lease." There are four basic elements to EMARS:

(i) Management Framework Plans (MFP's), or basic land use plans, prepared by BLM with some local input. MFP's are actually more a land use-inventory and conflict identification tool, with recommendations on resolution of conflicting resource uses.

(ii) System of nominations for new tract leases, by industry, states, and the public. Industry is allowed to nominate certain tracts for leasing, and must rank new requests and pending preference right lease applications in each nominee's national order of priority. State governments and the public may also nominate, or may request against nomination of certain tracts.

(iii) Environmental analysis. Nominated tracts will be evaluated to determine environmental effects of leasing. It is anticipated that most nominated tracts will be within one of the ten regional impact statements now scheduled; those not within such an area will have an Environmental Analysis Record or supplemental EIS prepared.

(iv) Technical examination and tract evaluation. The Geological Survey will identify specific reclamation requirements and bonding stipulations for each tract, and will also evaluate the value of the coal on the proposed tract, in order to insure that mining will be economic, and in order to determine minimum bid levels.

(b) As a matter of public policy, Interior will not consider new leases on land subject to a coal lease, permit, or preference right lease application, and will not issue leases in National Wildlife Refuges, units of the National Parks, Wilderness Areas, and primitive areas.

(c) The EMARS program has been under development for some time, apparently with considerably debate as to what it should include and how it might be implements. An environmental impact statement (EIS) was begun in 1973, when the moratorium on leasing was formally announced, and a draft was issued in May of 1974. The draft was heavily criticized and was reissued in final form, after substantial revisions, in September of 1975. This "Coal Programmatic EIS" contains the seeds of the EMARS process, although in both the draft and the final Coal Programmatic it is impossible to discover just what "EMARS" is or how it will work.

After apparently considerable debate within the Department of the Interior as to how EMARS should be implemented, proposed regulations further defining EMARS were issued by the Department on March 16, 1976. Final regulations (43 CFR 3520) were issued by the Department of Interior on May 25, and a "Call for Industry Nominations and Areas of Public Concern" together with a "Request for Information on Areas of Interest with Respect to Areas Suitable or Unsuitable for Federal Coal Leasing" was issued soon thereafter. Under this call, nominations were to be submitted to the Bureau of Land Management by July 31, 1976.

2. Adoption of a Totally Competitive Leasing System, Under Which no Coal Prospecting Permits will be Granted.

   On January 26, 1976, Secretary Kleppe announced that "We have determined that all future leasing of federal coal will be made under a competitive leasing system. No new prospecting permits will be issued under our new policy." The final version of the "commercial quantities" regulations (see below) reports that comments on the proposed regulations requested clarification as to whether new prospecting permits will be issued for coal. In attempting to provide the requested clarification, the final regulations state "On January 26, 1976, Secretary Kleppe announced that, in the near future, no new prospecting permits would be issued for coal." (41 F.R. 18846) We are unable to determine whether addition of the phrase"...in the near future..." is a clerical error, or a shift in policy.

The question has arisen as to whether the Department of the Interior is bound to issue no more prospecting permits and whether the Department must issue only competitive leases for coal. The answer clearly is that under section 2 of the mineral leasing act the Secretary shall award leases on federal coal land "...by competitive bidding or by such other methods as he may by general regulations adopt..." The same section specifically permits the Secretary to issue prospecting permits. In other words, until Congress specifies differently, it is strictly a Department policy decision as to whether or not all coal leases will be competitively bid.

3. Development of Final RegulationsGoverning Conditions under which Mining Operations and Post-Mining Reclamation on Federal Land must take Place. The 30 CFR 211 and 43 CFR 3041 regulations were issued in proposed form on September 5, 1975. After months of meetings, discussion, and comment,

the final regulations were issued May 17, 1976. The regulations establish for the first time reclamation performance standards for federal coal, with a variance procedure available in some instances. Generally speaking, more strict state reclamation standards will apply to federal lands and will be enforced by state officials.

While the regulations are now final, a number of questions remain. For example, when and how will Interior review state reclamation law to see if it will apply to federal land? What will be the form and content of memoranda of understanding for state enforcement and administration of state reclamation standards? Will Congress pass, and the President sign, a strip mine bill, and, if so, what will its effect be on the Interior regulations?

4. Preparation of Regional Environmental Impact Statements.

Although the Department of the Interior will argue that they are not required to do so under NEPA, the Department has recently undertaken several regional environmental impact statements related to coal leasing and development. The reason given for this policy is that the impact and significance of proposed federal coal leases will go beyond the confines of one lease tract and because federal development schedules will set the course for coal development on state and private land. Regional statement areas are defined by basin boundaries, drainage areas, areas of economic interdependence, areas of common reclamation requirements, and other relevant factors. Boundaries are subject to adjustment during EIS preparation plans.

One regional statement has already been completed for the Eastern Powder River area of Wyoming. A second EIS, for Northwest Colorado, is now in draft form. Ten additional regional environmental impact statements, with projected completion dates, are listed below:

--Sweetwater-Kemmerer, Wyoming (Aug. 15, 1977)
--Northern Powder R., Montana (Aug. 15, 1977)
--West-Central North Dakota (Oct. 15, 1977)
--Central Utah (Jan., 1978)
--Southern Utah (Oct., 1977)

--Hanna Basin-Atlantic Rim, Wyoming (April, 1978)

--West-Central Colorado (April, 1978)

--Star Lake-Bisti, New Mexico (July, 1978)

--North-Central Alabama (July, 1978)

--East-Central Oklahoma (July, 1978)

5. Short-Term or Emergency Leasing Criteria.

The Secretary's announcement of January 26, 1976 says that short-term leasing criteria, in effect since 1973, will continue until the new coal leasing system (i.e., EMARS) has been implemented. The same announcement later says that the short-term criteria will be used until the new leasing system is "completely" implemented. The final EMARS regulations, section 3520.1-2, state that all steps in the competitive leasing procedure "...must be completed before leasing can occur, except where coal leases may be issued under the Department's short-term leasing criteria."

All the above citations seem to leave open the questions of when, where, and to what extent the short-term criteria will be applied. There has been very little dissatisfaction with application of the criteria during the past three years, and only a limited number of leases (about 10) have been allowed during this period. However, ambiguities in the regulations and the policy statements seem to leave open possibilities for increased application of the short-term criteria, as a means of circumventing the EMARS process. Interior spokesmen have given assurance that this will not be the case, but their assurances are not necessarily reflected in the regulations.

The short-term leasing criteria are as follows:

(a) The proposed lease must be necessary for continuation of an ongoing mining operation, or

(b) The proposed lease must be necessary as a reserve for production in the near future, generally to fulfill production requirements within five years.

(c) In all cases, these special actions will be approved only when the provisions of the National Environmental Policy Act have been met. An environmental assessment must be made to determine whether the proposed action is major in scope. If so, an environmental impact statement will be completed.

(d) This limited leasing will be granted only when the environment can be adequately protected and the land can be adequately reclaimed.

6. New Diligent Development Regulations.

There are currently about 16 billion tons of federal coal under lease. The Mineral Leasing Act requires diligent development of federal leases, but until recently, no standard of diligence had been established or applied. Proposed regulations defining "due diligence" were issued December 31, 1975, and final regulations were issued May 28, 1976 (43 C.F.R. 3520, 41 Federal Register 21779). In general, these regulations require a lessee to develop 2½% of his reserve in 10 years and 1% per year thereafter, and must pay advance royalties beginning in the sixth year. The purpose of these regulations is to force those holding coal leases to develop them, or give them up.

7. Commercial Quantities Regulations.

Under the mineral leasing act, holders of prospecting permits are entitled to a preference right lease if they have discovered minerals in "commercial quantities." Until recently, there were no guidelines to determine what was a "commercial quantity" under 30 U.S.C. 201(b) or a "valuable deposit" under 30 U.S.C. 211(b) and 262, 272, and 282. Proposed regulations defining these terms and specifying what information an applicant must submit to substantiate his claim were issued January 19, 1976. Final regulations (43 C.F.R. 3520) were issued May 7, 1976 (41 F.R. 18845).

A major change in the final regulations is the division of the preference right lease application procedure into two phases. The applicant submits data in the first phase, from which the Department prepares lease terms and stipulations. Based upon the lease terms and stipulations, the applicant then submits data on revenues and costs. The prudent person standard is applied. The applicant must show that there is a reasonable expectation that revenues will exceed costs of developing, extracting, removing, and marketing the mineral. Interior contends that the "overall balance" definition or the "workability" definition were discarded in favor of the "prudent man" test, because only the latter complied with the requirements of the mineral leasing act.

The commercial quantities regulations apply to pending and future applications for preference right leases, but the Department will not go back and review existing preference right leases to determine if they were properly issued. The Department will use current and expected prices and costs, rather than prices and costs as of time of application, in determining whether commercial quantities are present. The costs of compliance with state and local regulations are costs which are to be considered, as are costs imposed by lease terms and stipulations.

The regulations also provide that the initial application for a preference right lease must be accompanied by the first year's rental of 25¢ per acre. The Department claims that such a minimum first year deposit of rent will not preclude rental increases in first or future years.

B. Legislative Changes in Coal Leasing and Coal Policy. Throughout much of the 1976 session, Congress had before it major legislation which would amend the Mineral Leasing Act. Much controversy was generated by the continuing discussion as to whether a federal strip mine bill -- affecting either all lands or just federal lands -- should be part of amendments to the Mineral Leasing Act. In a surprise move, strip mine legislation proponents withdrew, and the Senate approved a House bill (HB 6721) which makes major changes in the Mineral Leasing Act. The final bill, known as S. 391, was vetoed by the President, but the veto was overriden on August 4, 1976. The major provisions of the new act are summarized below.

1. Reform of the Federal Coal Leasing Program

   (a) Land Use Plans: Bill would require comprehensive land use plans to be prepared by the federal government prior to leasing and that leasing be consistent with such plans. In the case of national forest land the Secretary of Agriculture would prepare the land use plan. In cases where the federal interests are insufficient to justify the cost of preparing a land use plan, a comprehensive land use plan prepared by the state or a "land use analysis" prepared by Interior Department would suffice.

(b) State Input in Land Use Plans: Consultations with state and local governments and the public in the preparation of land use plans is required and, if requested, a public hearing prior to adoption of the plan must be held. In cases where the state land use plan is used, the state must consult with local government.

(c) Consultation with Federal Agencies: If the land to be leased is under the jurisdiction of a federal agency other than Interior, the lease can only be made with the consent of the agency and the agency may prescribe conditions with respect to the use and protection of the non-mineral interest of such lands.

(d) Socioeconomic Impact Evaluation: Prior to issuing a lease, the Secretary of

Interior "shall consider the effects which mining of the proposed lease might have on an impacted community or area, including, but not limited to, impacts on the environment, on agricultural, and other economic activities and on public services.

(e) Governor's Input on Leasing in National Forests: Any lease proposal within the boundaries of a national forest must be submitted to the governor of each state within which the coal deposits subject to such lease are located. No such lease may be issued before the expiration of the sixty-day period beginning on the date of such submission. If the governor objects to the issuance of the lease, the lease shall not be issued before the expiration of the six-month period beginning on the date the Secretary of Interior is notified of the governor's objection. During the six-month period, the governor may submit to the Secretary of Interior a statement of reasons why the lease should not be issued and the Secretary of Interior a statement of reasons why the lease should not be issued and the Secretary of Interior shall, on the basis of such statement, reconsider the issuance of the lease.

(f) Recoverability of Coal: Federal land use plans must include an assessment of coal deposits and identify the amount of coal recoverable by surface and underground mining. Prior to issuing a lease, the Secretary of Interior must evaluate the effects of various mining methods and determine which method achieves the maximum economic recovery of the coal. No mining plan can be approved unless it will achieve the maximum economic recovery of the coal in the tract.

(g) Government Exploration: Bill directs the Interior Department to conduct a comprehensive exploratory program designed to obtain sufficient data to evaluate the extent, location, and potential for developing known recoverable federal coal resources. Secretary of Interior must develop and send to Congress a plan for implementing an exploration program within 6 months. The plan would schedule exploratory activities and identify regions to be explored in the next 5 years.

(h) Exploration Licenses: Bill eliminates prospecting permits and requires exploration licenses which do not confer a right to a lease. (Bill does not affect existing prospecting permits or pending preference right lease applications.) Bill requires a separate license for exploration in each state and specifies that the license "shall be subject to all applicable federal, state, and local laws and regulations." Data from exploration activities would be kept confidential by the Secretary of Interior until a lease is issued or until such time as the Secretary of Interior determines release of the data to the public would not damage the competitive position of the license. Penalties for exploring without a license are provided.

(i) Competitive Leasing: Bill requires that all leases will be awarded by competitive bidding (except pending preference right lease applications). Additionally, at least 50% of total acreage offered for lease in a year shall be leased under a system of deferred bonus payment. Prior to bidding the Secretary of Interior must give an opportunity for comment on the value of the lease to be bid on.

(j) Preferential Treatment of Public Bodies: Bill requires that "a reasonable number of leasing tracts be reserved and offered for lease...to public bodies, including federal agencies, rural electric cooperatives, or non-profit corporations controlled by any of such entities."

(k) Mining Plan: The lessee must submit a mining and reclamation plan to the Department of Interior within 3 years of the issuance of a lease. If the leased land is not under Interior's jurisdiction, the appropriate federal agency must approve the terms of the plan.

(l) Logical Mining Unit: Bill permits Secretary of Interior to consolidate leases into a logical mining unit (LMU). Any person affected by such a consolidation may request a public hearing prior to consolidation. The mining plan of an operator in a LMU must require that all reserves in the LMU be mined within 40 years or less, as determined by the Secretary of Interior. Leases prior to enactment of the bill may be consolidated into a LMU if all lessees consent or, pursuant to regulations, the Secretary of Interior may require lessees to form a LMU. No LMU can exceed 25,000 acres (both federal and non-federal lands).

(m) Limits on Acreage Leased: Bill limits acreage leased to one entity in one state to 46,080 and 100,000 in the U.S. However, present lessees holding more than 100,000 acres in the U.S. would not have to relinquish existing leases but could not acquire new leases until their holdings dropped below 100,000 acres.

(n) Length of Lease: Leases would be for 20 years and so long thereafter as coal is produced in commercial quantities. After the initial 20-year period, lease terms can be adjusted every 10 years.

(o) Minimum Coal Royalties: Bill sets minimum coal royalty at 12½% of the value of the coal, except the Secretary of Interior may set a lower minimum royalty in the case of underground mining.

(p) Diligent Development: Bill provides that any lease not producing in "commercial quanitities" at the end of 10 years shall be cancelled. For existing leases, the 10-year period begins on the dateof enactment of the bill. No discretion is given to the Secretary of Interior to extend a lease not producing in commercial quantities beyond the 10-year period, except in cases where advanced royalties would be paid. No lease can be issued to persons holding leases which have not been diligently developed.

(q) Advanced Royalties: Bill requires payment of advance royalties in lieu of continuous operation in cases where the mining operation is interrupted by strikes or other circumstances not attributable to the lessee. A lessee cannot use advanced royalties paid during the initial 20-year term of a lease to reduce production royalties after the twentieth year of a lease.

(r) Additions to Leases: A lease can be modified, upon the request of the lessee and approval by the Secretary of the Interior, to increase the number of acres leased by up to 160.

(s) Anti-Trust: Bill requires Interior to submit all decisions on the issuance, renewal, or readjustment of coal leases to the Attorney General for his assessment of possible violation of anti-trust laws. If the AG finds that an action would create or maintain a situation inconsistent with the anti-trust laws, the Secretary of Interior cannot take the action unless a public hearing is conducted and the proposed action is determined to be in the public interest and there are no reasonable alternatives.

(t) Mining in National Parks: Bill prohibits coal mining in National Parks, National Wildlife Refuges, Wilderness Areas, National

System of Trails and Wild and Scenic Rivers Systems.

(u) Public Hearings: The following public hearings are required:

(1) Prior to approval of land use plan (held on request).

(2) Prior to the lease sale (held in area to be leased).

(3) Prior to consolidating coal leases into a Logical Mining Unit (held on request).

(4) Prior to taking action on a lease which the Attorney General finds would be inconsistent with anti-trust laws.

Opportunity for public comment on the value of a tract to be leased must be provided prior to bidding on a lease.

(v) Compliance with Pollution Laws: Bill requires each lease to contain provisions requiring compliance with Federal Water Pollution Control Act and Clean Air Act.

2. Federal Coal and Geothermal Leasing Revenue Returned to States

(a) Bill raises the percentage of federal coal leasing revenue returned to states from the present 37½% to 50% and the percentage of geothermal leasing revenue returned to states from the present 5% to 50%. 12½% of the coal and geothermal leasing revenue would be used by a state and its subdivisions as the legislature may direct giving priority to those subdivisions of the state socially or economically impacted by development of federally leased minerals for (1) planning, (2) construction and maintenance of public facilities, and (3) provisions of public services. The remaining 37½% of revenues returned to states would be used for schools and roads.

(b) Bill also provides that funds now held or to be received by Colorado and Utah from the Department of Interior oil shale test leases known as 'C-A,' 'C-B,' 'U-A,' and 'U-B' may be used for planning, construction and maintenance of public facilities, and provisions of public services.

C. The Mineral Leasing Act Amendments and the New Administrative Coal policy.

1. In many respects the amendments to the mineral

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leasing act and the new administrative policy on coal leasing are correlative, and the general direction of each is the same. At this early date it is simply too early to tell what effect the legislation will have on the newly promulgated executive policy. Our guess is that most of the policy will stay, but that some elements (i.e., MFP's, due diligence regulations) will require some changes.

2. The following chart presents an issue by issue comparison of the new legislation and the new administrative policy.

PROVISION	LEGISLATION (S 391)	DOI REGULATIONS
Bidding system	Competitive bidding on all tracts with 50% of all lands leased on a deferred bonus payment system. Interior Secretary is prohibited from accepting a bid for less than fair market value of the leased coal.	Competitive leasing. USGS to do evaluation of tract to determine fair market value and minimum bid. Inter-tract bidding permitted. Multiple nominations must be ranked by priority.
Lease size and logical mining unit definition	Leases shall be of a size that permits the mining of all coal that can be economically extracted. But, LMU can be no larger than 25,000 acres.	Nominations to describe reasonably compact areas. Limit is 2,560 acres, or size of the LMU. Each lease is automatically considered to be an LMU.
Reserved leases	A "reasonable number" of leases are to be set aside for leasing only to public bodies.	No provision.
Royalties & rentals	Lessee shall pay not less than 12.5% of the value of the coal, but Sec. may set a lower rate for underground mining operations. Sec. shall set rentals.	8% of value of coal at the mine mouth. This can be varied, but may not be less than 5%. (This is policy-not part of any current legislation).
Lease terms	Leases issued for 20 years and so long thereafter as coal is produced. Leases not producing after 10 years will be terminated.	Indefinite, with 20-year readjustment, subject to diligence and advanced royalties.
Exploration	Interior Sec. may issue exploration permits for a period of not more than two years. Licensee must submit an exploration plan, data must be turned over to interior, but will be kept confidential. Exploration permits don't carry leasing rights.	Interior will allow core drilling for resource information. Companies will be allowed to share costs and share information. Eventually, new testing rules will be proposed.

Federal exploration	Interior Secretary is authorized to conduct a federal exploration program to provide information and a basis to assess the value of the coal.	No provision. Interior is opposed to a federal exploration program.
State payments	Reduces amount paid from revenues to reclamation fund from 52.5% to 40%. Raises impact payments to states from 37.5% of revenues to 50%. The remainder goes to the Treasury.	Administration legislation asks for loan guarantees to impacted states.
Diligence requirements & continuous operation	Must submit mining and reclamation plan within 3 years of issuance of lease. Leases not producing in "commercial quantities" within ten years are to be cancelled. Advance royalties may be paid in lieu of continuous operation if delay is not attributable to lessee and if public interest is so served. Advance royalties are not to be substituted for diligence development.	Lessee must mine 2.% of lease reserves within 10 years. Lessee must pay advance royalty beginning in sixth year of the lease, based on a production schedule of exhausting reserves in 40 years. After 10 years, royalties are 3% per year on production value. Extension of ten-year period permitted for strikes, etc. or for firm contracts for coal from that LMU. Annual advance royalties may be paid in lieu of continuous operation.
Public hearings	Could require four hearings: upon promulgation of a land use plan; prior to leave approval; before formation of logical mining unit; and prior to determination of fair market value.	Public meetings throughout the land use planning proces. Public meeting to review land use plan and comment on nominations. Public meetings to comply with NEPA, or meetings on EAR if no EIS to be done.

Land use planning	Requires comprehensive land use plan, including socio-economic impacts, before issuance of lease.	Land use plan includes inventory and assessment of resources, socioeconomic analysis, land use recommendation by resource, and resources trade-off.
Tract selection criteria	No specific provision. Land use plan to assess amount of coal recoverable by deep mining and by surface mining. Secretary to consider effect of mining any tract on environment, agriculture, and other economic activity; and effect on public services.	Depth, quality, thickness of coal; water resource availability; relationship to existing communities; potential impact on economic structure; service and access corridors; aesthetic qualities; rehabilitation potential; other criteria on lands unsuitable for mining, as developed by Secretary.

3. Our preliminary analysis indicates that there are several areas of conflict between the legislation and the existing regulations. One potential area of concern is the land use plan. The EMARS system requires that a MFP (multiple framework plan) be completed prior to leasing. The question is whether a MFP will qualify as a "comprehensive land use plan" under the legislation. Many feel that MFP's are simply resources inventories, not land use plans, and will contend that a MFP is only the first step in a comprehensive land use plan. Another conflict in the same area is the legislative requirement that all leasing be

compatible with the land use plan. Under EMARS, leasing could take place even if the MFP showed no mineral activity in that area.

A second conflict between the administration policy and the legislation is the definition and application of "due diligence" standards. The legislation cuts off the lease after ten years if it is not producing in "commercial quantities." EMARS requires production of 2½% of lease reserves within ten years. It is difficult to say whether one provision is more strict than the other, and in most instances the determination would turn on the amount of reserve and/or the meaning of "commercial quantity" at that particular time. In any case the Department of Interior will certainly have to alter their regulatory definition of "due diligence" to comply with the new law.

In summary, however, we do not see very many significant areas of conflict between the legislation and the administration's approach. The thrust of both is quite similar: tighter regulation of coal leasing; greater public involvement; totally competitive bids based on fair market value; diligent development of all leases; and comprehensive planning and consideration of environmental and socioeconomic effects of mining, prior to issuance of the lease. While these reforms may take slightly different forms in statutory as opposed to regulatory format, any of these measures are major improvements over the past coal leasing policies. The legislation goes beyond the administration policy, by changing boththe royalty rate and the percentage of revenue returned to the states; by requiring a government-sponsored exploration program, and by requiring a rigorous anti-trust review of potential leases prior to issuance.

Land Use Control in Colorado - Impact on Community Development

COLORADO LAND USE LAW

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COLORADO LAND USE LAW

by

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I. STATE OF COLORADO LAND USE CONTROLS

Although land use control in Colorado is thought of as purely a local matter, numerous state agencies have significant land use control powers and many state statutes impose either direct or indirect land use controls.

A. Major State Land Use Agencies

1. Colorado Land Use Commission

The Colorado Land Use Commission (LUC), established by the "Colorado Land Use Act" in 1970, §24-65-101, et seq., consists of nine members appointed by the governor who serve without compensation. Five members are appointed for five-year staggered terms while four serve at the governor's pleasure. Of the nine members, no more than seven may come from any one major political party; one must reside west of the continental divide, one in southwest Colorado, and one in northwest Colorado. General Rules of Procedure, LUC §1-1-100, et seq., were adopted on 11/14/75, effective 5/10/76.

a. General Powers

The LUC has been given thirteen specific duties and powers:

--to develop a final land use planning program by December 1, 1973;

--to use its temporary emergency power to block or halt land development activities of serious and major dangers to public health, welfare, and safety;

--to develop model county subdivision regulations by January 1, 1972;

--to develop model resolutions for local governments in developing land uses and construction controls within designated floodways;

--to designate critical areas in the state where one hundred year floodways should be identified and assist appropriate state agencies and local governments to adopt programs for this identification.

--to "designate critical conservation and recreation areas and recommend state involvement in land use in such areas.";

--to designate areas of critical planning need containing local governments which need planning funds under the "Colorado Planning Fund Act";

--under H.B. 1041, to:

  --adopt guidelines for designation of matters of state interest;

  --receive reports of local government progress;

  --review local government orders containing designation and guidelines;

  --request local governments to take action on matters of state interest and obtain judicial review of the local government's action or inaction;

  --assign full-time professional staff members to assist local governments, monitor their progress, and report on that progress no later than February 1, 1975;

--to review major activity notices from municipalities for proposed subdivision or commercial or industrial activities covering five acres or more.

b. LUC's Temporary Emergency Powers

By far the most important affirmative power possessed by the LUC is its temporary emergency power. Under that power the LUC can act when it:

"determines that there is in progress or that there is proposed a land development activity which constitutes a danger of injury, loss, or damage of serious and major proportions to the public health, welfare, or safety . . ."

(1) Notice to the Local Government

Once the LUC makes such a determination, it then must give "written notice" to the appropriate local government. The notice must describe the "pertinent facts and dangers" of the land development.

(2) Failure of the County to Act

If the local government does not act within a "reasonable time," the Governor may review the situation at a meeting with the local government's governing body upon the request of the LUC.

(3) Cease and Desist Order

If the local government fails to act and the Governor then determines that the land development constitutes a serious danger to public health, welfare, or safety, he may direct the LUC to issue its written cease and desist order to "the person in control" of the land development.

(4) Injunctive Relief

If, in spite of the LUC's order the land development continues, the LUC may apply to the appropriate district court for judicial relief. The district court has exclusive jurisdiction to make a final determination on the matter.

(5) Planning Criteria

When the LUC issues its order or obtains judicial relief, the LUC;

> "shall proceed immediately to establish the planning criteria necessary to eliminate or avoid such danger."

Once the "planning criteria" are established, the local government shall implement them immediately.

(6) Procedures

Procedures covering the exercise of the temporary emergency power are contained in Part 1, Chapter 2, of the LUC Regulations.

2. Department of Local Affairs

The Department of Local Affairs contains three organizations of interest to planning professionals in Colorado: the Division of Planning, the Division of Local Government, and the Office of Rural Development.

a. Division of Local Government (§24-32-101, et seq.)

This division has several very important responsibilities. Without "exercising any power of control or supervision over any unit of local government" it is to, inter alia:

--"serve as a clearing house, for the benefit of local government, of information relating to the common problems of local government and of state and federal services available to assist in the solution of those problems;

--"refer local government to appropriate departments and agencies of the state and federal government for advice, assistance, and available services in connection with specific problems;

--"encourage and cooperate in training institutes, conferences, and programs for local government officials and employees;

> --"upon request by local government officials, provide technical assistance in defining their local government problems and developing solutions thereof."

In addition, the Division of Local Government maintains a public file listing all municipalities and counties in the state, including a map and legal description of each one's boundary.

b. Office of Rural Development (§24-32-801, et seq.)

In response to concern over the economic stagnation and deterioration of many rural communities, the General Assembly in 1973 established the Office of Rural Development, into which were transferred the books, records, assets, and liabilities of the abolished Colorado Rural Development Commission. The new office is headed by the Coordinator of Rural Development and located within the Department of Local Affairs.

The office's role is primarily one of coordination within the Department of Local Affairs for the purposes of:

> --"cooperating with and providing technical assistance to local officials for the orderly development of rural Colorado;
>
> --"encouraging and, when requested, assisting local governments to develop mutual and cooperative solutions to rural community development;
>
> --"studying the legal provisions that affect rural development and recommending to the governor and the general assembly such changes and provisions as may be necessary to encourage rural development;
>
> --"serving as a clearinghouse for rural development information, including state and federal programs designed for rural development;

--"carrying out studies and continuous analyses of rural development in the state with particular emphasis on its effect on population dispersion and economic opportunity;

--"encouraging and assisting, when requested, local governments to develop mutual and cooperative solutions to rural community development;

--"contracting with the federal government or any agency or instrumentality thereof and receiving any grants or moneys therefrom for purposes of rural development in Colorado."

c. Division of Planning (§24-32-201, et seq.)

The Division of Planning, headed by a director, is located within the Department of Local Affairs and should not be confused with the Division of State Planning which is located within the Office of State Planning and Budget.

The director of the Division of Planning is to:

--"exchange reports and data which relate to state planning with other departments, institutions, and agencies of the state and on a mutually agreed basis with towns, cities, cities and counties, counties, and other local agencies and instrumentalities;

--"attend and participate in meetings of county, municipal, or regional planning bodies, interstate agencies, and other planning conferences;

--"advise the governor and the general assembly on all matters of statewide planning, and consult with other offices of state government with respect to matters of planning affecting the duties of their offices; recommend to the governor and the general assembly any proposals for legislation affecting local, regional, or state planning; and

--"exercise all other powers necessary and proper for the discharge of his duties and the carrying out of the intent of this part 2, including the coordination of county and regional planning."

The Division of Planning, itself, has the following enumerated statutory duties:

--"function as an advisory and coordinating agency;

--"stimulate and assist the planning activities of other departments, institutions, and agencies and of regional, county, and municipal planning authorities and harmonize its planning activities with theirs;

--"participate in comprehensive interstate planning and other activities related thereto;

--"provide planning assistance upon request to any town, city, city and county, county, regional area, or any group of adjacent communities having common or related planning problems; and whenever such assistance includes the rendering of technical services, such service may be rendered without charge, or upon advance agreement shall be rendered with reimbursement;

--"make studies and inquiries relevant to state planning of the resources of the state and of the problems of agriculture, industry, commerce, as well as population and urban growth, local government, and related matters affecting the development of the state;

--"provide information to and cooperate with the general assembly or its committees concerned with studies relevant to state planning;

--"prepare, and from time to time revise, an inventory, in collaboration with the appropriate state and federal agencies, of the public and private natural resources, of major public and private works, and of other facilities and information which are deemed of importance in planning for the development of the state;

--"advise and supply available information to civic groups and other organizations that concern themselves with state or local planning problems and community development;

--"provide information to the citizens of Colorado and to officials of state departments and local agencies to foster an awareness and an understanding of the functions of state, regional, and local planning;

--"accept and receive grants and services from the federal government, other state agencies, local governments, and from private and civic sources;

--"act as reviewing authority or otherwise provide cooperative services under any federal-state planning programs."

In addition to the above duties, the Division of Planning is designated as the "primary state agency of demographic information" and is to:

> ". . . prepare, maintain, and interpret such population statistics, estimates, and projections as the director of the division of planning shall direct, including distributions of the state's population by significant groupings,

such as school- and college-age populations, political subdivision populations, and racial and ethnic populations."

Furthermore, under H.B. 1041 (1974), the Department of Local Affairs (acting through the Division of Planning) is to conduct a statewide program (including standards) for the identification of matters of state interest as part of local master plans.

Finally, the division is authorized to provide financial and technical planning assistance to local governments.

3. Other State Officials or Agencies

There are several other officials or agencies which have substantial impact on land use, including:

a. The Coordinator of Environmental Problems with the office of the governor.

b. The Department of Health which is responsible for a wide range of matters, such as pollution control.

c. Department of Natural Resources, which includes the Soil Conservation Board, Water Conservation Board, Division of Mines, Geological Survey, Division of Wildlife, Division of Parks and Outdoor Recreation, Division of Water Resources, Oil and Gas Commission, and the Land Reclamation Board.

d. Department of Highways, which is responsible for such things as the state highway system, the highway master plan, the highway action plan, etc.

e. Planning Coordinating Council, which is supposed to coordinate planning activities by state agencies.

f. Energy Policy Council.

g. State §208 coordinator.

B. Selected Functional Areas

1. Mining

a. Coal Mines -- Division of Mines
(Tit. 34, Art. 20-31, C.R.S. 1973)

(1) Chief Inspector of Coal Mines:

(a) Maintains records on mine employment and production.

(b) Inspects (district inspectors) each mine at least four times a year.

(2) Stabilization and Reclamation for Underground Mines

When an inspector finds that surface areas have been disturbed or affected after July 1, 1969, by underground coal mining operations and that those surface areas are improperly stabilized or reclaimed, the inspector may require by notice that defective or deficient conditions be promptly remedied. Unless compliance is forthcoming, the Commissioner of Mines may obtain a court injunction against continued mining operations.

(3) Coal Mine Maps

Coal mine owners are required to prepare a variety of maps which are available to the public, which may be of value to planning professionals, and which are filed in the Chief Inspector's office and available at the mine itself. In general, the owner is required to prepare a correct surface map and underground workings map of every seam worked. If he fails to do so the Chief Inspector may have the maps made at the owner's expense. The maps may be combined but must be filed within six months after commencement of operations and updated every six months or every year, depending on the number of underground employees. The maps will show the mine's exact location and must be at a scale of between one hundred feet and two hundred feet to the inch. More specifically, the various maps are described as follows:

(a) Underground maps:

"The underground maps shall be made on the same scale as the surface map and shall show the mine openings or excavations, the shafts, slopes, drafts, connections with other mines or workings, or other seams in the same mine, the entries, rooms, pillars, abandoned workings, airways with darts showing the direction of air currents, crosscuts, breakthroughs, overcasts, undercasts, doors, permanent stoppings, and current regulators, haulage, electric lines, position of pumps, fans, stationary hauling engines, engine planes, water lines, fire fighting equipment, telephone stations, fire walls, standing water, dammed-back water, motor houses, stables, and the barrier pillars between adjoining properties. Each map shall show the elevation of the main haulageways and cross entries every five hundred feet."

(b) Strip pit maps:

"Maps of strip pit operation shall show the surface features of the property in true relation to the strip pit excavation area, and shall show the excavation made every six months, and all the features asked for in sections 34-30-102 to 34-30-104 which may apply to them."

(c) Surface maps:

"When the mine map does not show surface features, the surface map shall be made on transparent or translucent cloth or paper, so that it may be overlaid on the map of the underground workings to show the true relations of the surface features to the mine workings and excavations. It shall show all surface features overlying the coal seam such as ravines, intermittent and permanent streams, bodies of standing water, county, township, and section lines, township and section lines, township and section numbers, town lots, streets and roads, the location of the mine openings, the position and names of buildings, coke ovens, railroad track, side tracks and mine tramways or haulageways, boundary lines of the property, the elevation above sea level of some point, bench mark, or permanent monument near the main opening of the mine, and all outcrops of coal seams where the same are visible. If the surface map is made on tracing cloth it shall be returned to the owner for extension."

(4) Coal Mine Reports

Several routine reports are required of mine owners which are available to the public and may be of value to planning professionals:

(a) Monthly:

"The report shall show the name of the company, the name of the mine, the name of the superintendent, the names of the mine foremen, character of coal, kind of opening, number of days worked, number of employees underground and on the surface, total man hours worked by employees, daily capacity of mine, total of coal mined in tons of two thousand pounds, and specify the amount of each grade of coal produced; nonfatal accidents, giving the names of persons injured and disabled to the extent that they are physically unable to resume their regular occupation on the day after the injury, their occupation, date and time of accident, nature of accident, cause of accident, and approximate length of time disabled. In case of a fatal accident, in addition to the above information, the report shall state whether the deceased was single or married and the number of children left, when such information can be obtained; and the length of time engaged in coal mining."

(b) Annual:

"[The report] shall show: The name of the owner or other official to whom official communication shall be sent, the total number of tons of coal mined, number of tons of coal sold outside the state, volume of air current in cubic feet per minute, thickness of coal seam, number of tons of lump, number of tons of slack and nut and the number of tons of coke made, railroad connections, average number of employees for year, number of employees at date of making report, number of fatal accidents, tons mined by hand undermining, tons mined by machine, number of mining machines operated by electricity and number of machines operated by compressed air. It shall contain all other similar information which may be called for in the blanks issued by the chief inspector for such report."

In addition, duplicate copies of all reports required by the Federal Coal Mine Safety Act of 1969 are also filed in the Chief Inspector's office.

(5) Abandoned Coal Mines

Abandoned underground coal mines must be sealed or ventilated and a warning must be posted at the entrance. The edges of abandoned strip pits must be sloped or fenced to eliminate the possibility of persons or livestock falling into the excavation. In operating mines, certain precautionary bore holes and rib holes must be maintained when approaching abandoned workings. In addition, the owner must notify the chief inspector prior to the abandonment of a mine or resumption of work after abandonment and certain maps may have to be prepared upon abandonment:

> "Whenever a mine is about to be abandoned or closed for an indefinite period, the owner shall have made a complete final survey of all workings not represented on the maps and plans of such mine, and shall properly enter the results upon the maps of the mine so as to show the exact relations of the most advanced workings to the boundary of the property, and shall file a copy of same with the chief inspector."

b. Mined Land Reclamation

Under the Colorado Mined Land Reclamation Act of 1976, §34-32-101, *et seq.*, C.R.S. 1973, 1976 Colo. S.L., *pp.* 765, *et seq.*, the Mined Land Reclamation Board (MLRB), within the Department of Natural Resources, is responsible for reviewing applications from and permits for every "operator" conducting a "mining operation" and for monitoring the activities of prospectors.

(1) Mining Operations

"The development or extraction of a mineral from its natural occurrences on affected land. The term includes, but is not limited to, open mining and surface operation and the disposal of refuse from underground and in situ mining. The term includes the following operations on affected lands: Transportation; concentrating; milling, evaporation; and other processing. The term does not include: The exploration and extraction of natural petroleum in a liquid or gaseous state by means of wells or pipe; the extraction of geothermal resources; smelting, refining, cleaning, preparation, transportation, and other off-site operations not conducted on affected land."

(2) Operator

(a) Broad Definition

"Any person, firm, partnership, association, or corporation, or any department, division, or agency of federal, state, county, or municipal government engaged in or controlling a mining operation."

(b) Types of Operators

- --Normal mining operator;
- --"Special permit operator" doing road construction;
- --"limited report operator."

(3) Permits for New Operations

(a) Standard -- good for the "life of the mine."

(b) 10-day Special Permits -- road or utility construction under government contract.

(c) Limited impact permits -- areas less than ten acres and extraction of fewer than 70,000 tons of mineral or overburden per year.

(4) Permits for Old Lawful Operations

(a) Permits for operations which were issued pursuant to the Colorado Open Mining Reclamation Act of 1973, now repealed, before July 1, 1976, remain valid but must be renewed under provisions of the new act.

(b) For those existing operations not needing a permit under previous law, application must be made for a new permit under the 1976 statutes before October 1, 1977. Mining may continue until the permit is denied.

(5) Pending Permit Applications

Applications under the 1973 Act which are pending on July 1, 1976, will be processed under the new 1976 Act.

(6) Prospectors

(a) Prospecting

"The act of searching for or investigating a mineral deposit. 'Prospecting' includes, but is not limited to, sinking shafts, tunneling, drilling core and bore holes and digging pits or cuts and other works for the purpose of extracting samples prior to commencement of development or extraction operations, and the building of roads, access ways, and other facilities related to such work. The term does not include those activities which cause no or very little surface disturbance, such as airborne surveys and photographs, use of instruments or devices which are hand carried or otherwise transported over the surface to make magnetic, radioactive, or other tests and measurements, boundary or claim surveying, location work, or other work which causes no greater land disturbance than is caused by ordinary lawful use of the land by persons not prospecting. The term also does not include any single activity which results in the disturbance of a single block of land totalling one thousand six hundred square feet or less of the land's surface, not to exceed two such disturbances per acre; except that the cumulative total of such disturbances will not exceed five acres statewide in any prospecting operation extending over twenty-four consecutive months."

(b) Requirements

--Notice of intent;
--Statutory surety;

--Notice of completion;

  --Reclamation within 90 days;
  --Inspection within 30 days;
  --Release of surety within 30 days.

(7) Reclamation

(a) Generally, all affected land must be reclaimed:

"Disturbed surface of an area within the state where a mining operation is being or will be conducted, including, but not limited to, on-site private ways, roads, and railroad lines appurtenant to any such area; land excavations; prospecting sites; drill sites or workings; refuse banks or spoil piles; evaporation or settling ponds; leaching dumps; placer areas; tailings ponds or dumps; work, parking, storage, or waste discharge areas; and areas in which structures, facilities, equipment, machines, tools, or other materials or property which result from or are used in such operations are situated. All lands shall be excluded that would be otherwise includable as land affected but which have been reclaimed in accordance with an approved plan or otherwise, as may be approved by the board."

(b) Substitution possible:

"With the approval of the board and the owner of the land to be reclaimed, the operator may substitute land previously mined and owned by the operator not otherwise subject to reclamation under this article or, in the alternative, with the approval of the board and the owner of the land, reclamation of an equal number of acres of any lands previously mined but not owned by the operator if the operator has not previously abandoned unreclaimed mining lands. The board also has authority to grant in the alternative the reclamation of lesser or greater acreage so long as the cost of reclaiming such acreage is at least equivalent to the cost of reclaiming the original permit lands. If any area is so substituted, the operator shall submit a map of the substituted area, which map shall conform to all of the requirements with respect to other maps required by this article. Upon completion of reclamation of the substituted land, the operator shall be relieved of all obligations under this article with respect to the land for which substitution has been permitted."

(8) Violations and Penalties

Operation without a permit or prospecting without a notice of intent or violation of a permit may incur penalties of $100 to $1000 per day, except for limited impact operation, for which the penalty is $50 to $200 per day.

c. "Metal" Mines (Tit. 34, Art. 40-54, C.R.S. 1973)

Although the most recent statutory codification classifies all mines except coal mines as "metal mines," it should be clear from the following discussion that the term is quite inclusive; e.g., including gravel pits.

(1) Bureau of Mines

The Bureau of Mines (BOM), a part of the Division of Mines in the Department of Natural Resources, is headed by the Commissioner of Mines and has administrative jurisdiction over all mines except coal mines.

In addition to supervising the work described below, the commissioner has the following duties, *inter alia*:

--"To collect and preserve for study and reference specimens of all the geological and mineralogical substances, including mineral waters found in the state, especially those possessing economic or commercial value, which specimens shall be marked, arranged, classified, and described, and a record thereof preserved, showing the character thereof and the place where obtained;

--"To collect and in like manner preserve in his office minerals, rocks, and fossils of other states, territories, and countries;

--"To collect and make a part of the records of his office the geological surveys and reports bearing upon the mining industry previously made by other officers of the state or by the United States government;

--"To collect and record all data and records giving the history and showing the progress of the mining industry of the state from the earliest date up to the present time;

--"To examine, report, and record the geological formation of each important mining district and each important mine, giving the name of the mine, altitude, location, name of owners, character of vein development, character of walls or enclosing rocks, character and extent of ore veins or deposits, methods of ore extraction, powder used, fuel used, water used in boilers, pressure carried, cost of fuel, cost of timbers, cost of transporting supplies to mine, cost per ton for transporting ore to market, method of treatment, cost of treatment per ton, average cost of sinking per foot, average cost of drifting per foot, average number of men employed, wages paid and hours worked, and all other information that will tend to give a correct idea of the expense and serve as a guide to profitable mining and milling of ore;

--"To investigate, report, and record the successfully used methods for the recovery of the precious metals, describing in detail mechanical operations of all important milling and reduction plans and results obtained;

--"To investigate, report, and record the advancement made in the application of electricity, compressed air, water power, and steam as labor-saving devices to all branches of mining operations;

--"To collect statistics upon smelting, concentrating, milling, and dressing of metalliferous ores, and upon all the mineral products of the state for reference and study;

--"To distribute reliable information regarding the product, available supply, location, character, and adaptability for economic purposes of the resources of Colorado in coal, coal oil, asphalt, iron, building stone, slates, marble, fire clays, cements, pottery and porcelain clays, asbestos, mica, and the various mineral waters and such other items within the province of this bureau as in the judgment of the commissioner of mines may be advisable;

--"To procure standard works on the mining industry, smelting, concentrating, milling, and dressing of metalliferous ores, mining engineering, geology, mineralogy, and other subjects which can aid in the study and promote knowledge of all who are interested in mining or manufacturing of any of the mineral products of this state;

--"To give receipt, when demanded, for all items enumerated in this section to the person from whom he receives them;

--"To make or cause to be made, with the approval of the governor and under the direction of some office of the bureau, exhibits of the mineral resources and products of the state at such industrial exhibitions held in this or other states or countries as may be deemed advisable or desirable, and for which due appropriations have been or may be provided;

--"To investigate, report, and record successful methods for the stabilization and reclamation of areas within the state which have been disturbed or affected by mining, milling, or related operations and to distribute upon request information concerning such methods."

(2) Inspection Districts

The commissioner appoints one inspector for each of four inspection districts: the Georgetown District or District number 1, the Cripple Creek District or District number 2, the Leadville District or District number 3, and the San Juan District or District number 4.

(3) Duties of Inspectors

The inspectors have the following duties:

--"to examine all ore mills, sampling works, smelters, metallurgical plants, rock and stone quarries, clay pits, tunnels, sand and gravel pit excavations and plants, and mines in this state of whatever kind or character, except coal mines;

--"to examine the manner and methods of working and timbering and the system of signals used in the mines and the efficiency of the same;

--"to examine, under cooperative agreement with the director of the division of labor and other appropriate state agencies, construction work on dams, federal and state highways, public and quasi-public excavations, and all excavations where rock drills and explosives are used;

--"to examine the surface areas disturbed or affected on or after July 1, 1969, by any operations upon properties or sites described in this section and the methods of stabilization and reclamation, including vegetation, if necessary and practical, employed in or on such areas to prevent landslides, floods, or erosion;

--"to examine the condition of all buildings, machinery, and other mechanical equipment used in and about said plants, all the open workings and exits in each mine and how the same are ventilated, the sanitary conditions in, around, and about said plants, and how and where all explosives and inflammable oils and supplies are stored; and

--"to make a report to the commissioner of the result of the examination of each property immediately after the inspection."

Under the terms of the statute, all examinations are to be without notice.

(a) Inspections and Reclamation

With an admonition to "exercise a sound discretion in the enforcement" of the law, the commissioner and his inspectors are required to make periodic inspections of all "ore mills, sampling works, smelters, metallurgical plants, rock and stone quarries, clay pits, tunnels, sand and gravel pit excavations and plants, and mines in this state of whatever kind or character, *except* coal mines" and to prepare reports on their inspections.

During the inspections, the inspectors are to look for two types of dangers or defects:

--"any matter, thing, or practice [which] threaten or tend to the bodily injury of any person, or

--"the surface areas disturbed or affected *on or after July 1, 1969*, by such operations are not being properly stabilized to *prevent landslides, floods, or erosion* and *reclaimed* by such measures, including vegetation, which are *necessary and practical* for such stabilization and reclamation . . ." (emphasis added)

If the inspection shows that the "lives or health of employees are in imminent danger from any cause whatsoever, the commissioner of mines or his inspector may, after written notice and subsequent order, close the mine. With respect to the reclamation requirements, the details of which may be reached by agreement between the commissioner and operator, the rather indefinite reclamation requirements may be enforced only by civil action by the state. The commissioner may require a performance bond, conditioned on performance of the stabilization and reclamation work agreed upon between the commissioner and the operator. It should be remembered, however, that the reclamation required here is only that which is necessary "to prevent landslides, floods, or erosion."

(b) Reports for Operating Mines

All owners or operators of an ore mill, smelter, metallurgical plant, rock quarry, clay mine, or mine of whatever kind or character, except coal mines, must submit reports annually, as well as when work is commenced or stopped, to the Bureau of Mines, stating:

> ". . . when work is commenced and when stopped, and shall report annually on or before March first of each year for the previous calendar year, the names of the owners, managers, lessees, or persons in charge of said work, together with the post-office address of each, and the name of each claim operated, the name of the county and mining district, together with the number of days operated, the number of men employed directly or indirectly, the same being classed according to place of employment, underground, surface on mines, and in or about other works, giving the total number of hours'

employment for which compensation is paid, also any other data which may be required by the commissioner."

(c) Abandoned Mines

Similar reclamation provisions exist for abandoned mines as for operating mines. In addition, all abandoned excavations must be "securely covered or fenced" and posted with a No Trespassing sign.

2. Recreational Trails (§33-42-101, *et seq.*)

In order to open up more of the state for public use, the General Assembly has determined that the State of Colorado shall:

--"establish and maintain trails within areas under the control of the division of parks and outdoor recreation and in those areas within a radius of thirty miles of population centers of fifty thousand or more to connect, when feasible, the units of the parks and outdoor recreation system, federal recreational lands, and other trail systems;

--"to perpetuate and provide use of and access to regions and trails of special or historic interest within the state;

--"to assist local governments in serving the requirements of the urban and other population centers of the state;

--"to encourage the multiple use of public rights-of-way and to utilize to the fullest extent existing and future scenic roads, highways, parkways, and federally administered trails where feasible as recreational trails;

--"to encourage the development and maintenance of recreational trails by counties, cities, and special improvement districts and to assist in such development and maintenance by all means available;

--"to coordinate trail plans and development among local jurisdictions and with the state and federal governments;

--"to encourage when possible the development of trails on federal lands by the federal government; and

--"to promote at all levels of government a more complete use of all or any portion of public property for recreational purposes."

The above responsibilities are to be discharged by the Division of Parks and Outdoor Recreation, which may acquire rights-of-way or easements for trails. The trails are to be located so as to minimize adverse affects on adjacent landowners and developed and managed so as to "harmonize with and complement any established multiple-use plans for that specific area."

The division is advised by a seven-member Recreational Trails Committee (RTC) which shall:

--"assist local governments in the formation of their trail plans and advise the division quarterly of its findings."

--"review records of easements and other interests in land which are available and may be adapted for recreational trail usage, including public lands, utility easements, floodplains, railroad and other rights-of-way, geological hazard areas, gifts of land or interests therein, and steep slope areas."

--"advise the division in the development of uniform standards for trail construction which may be adopted for statewide use and which will be made available to participating local governments."

--"offer plans and methods for funding a trail system through user fees or other financing methods."

Trails may be transferred to local governments if they agree to maintain and operate the trail and if the landowner over whose land the trail passes consents to the transfer. In addition, the division may make funds available to local governments.

The division is to designate a state trails system, the trails of which will meet the RTC's criteria. The trails may be marked by uniform signs and may be categorized as follows:

--"Cross-state trails which connect scenic, historical, geological, geographical, or other significant features which are characteristic of the state;

--"Water-oriented trails which provide a designated path to or along lakes, streams, or reservoirs in which water and other water-oriented recreational opportunities are the primary points of interest;

--"Scenic-access trails which give access to quality recreation, scenic, historic, or cultural areas of statewide or national significance;

--"Urban trails which provide opportunities within an urban setting for walking, bicycling, horseback riding, or other compatible activities. Where appropriate, urban trails shall connect parks, scenic areas, historical points, and neighboring communities.

--"Historical trails which identify and interpret routes which were significant in the historical settlement and development of the state."

In addition, the division must establish a procedure by which other levels of government may propose trails for inclusion within the system, as well as a procedure for review and public hearings upon proposals for inclusion of trails.

3. Private Control of Fish and Game (§33-40-101, *et seq.*)

Any person who keeps live wildlife must be licensed by the Division of Wildlife.

Licenses must be obtained from the division for commercial and private lakes, for commercial wildlife parks, for commercial big game hunting areas, and for controlled shooting areas.

4. Privately-Owned Recreational Areas (§33-41-101, *et seq.*)

In order to encourage landowners to allow their land to be used for "recreational purposes," the General Assembly has provided:

> --". . . an owner of land who either directly or indirectly invites or permits, without charge, any person to use such property for recreational purposes does not thereby:
>
> > --"Extend any assurance that the premises are safe for any purpose;
> >
> > --"Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed;
> >
> > --"Assume responsibility or incur liability for any injury to person or property or for the death of any person caused by an act or omission of such person."

Landowner liability is not limited, however, when it would otherwise exist, in the case of:

> --". . . willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm;
>
> --". . . injury suffered by any person in any case where the owner of land charges the person who enters or goes on the land for the recreational use thereof; except that, in case of land leased to the state or a political subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this article nor shall any consideration received by an owner from any federal governmental agency for the purpose of admitting any person constitute such a change;

--". . . maintaining an attractive nuisance;

--". . . injury received on land incidental to the use of land on which a commercial or business enterprise of any description is being carried on."

5. Noise Abatement (§25-12-101, et seq.)

In 1971, the General Assembly established "statewide standards" for noise levels in residential, commercial, light industrial, and industrial zones, which are defined as follows:

a. Residential Zone

". . . an area of single-family or multi-family dwellings where businesses may or may not be conducted in such dwellings. The zone includes areas where multiple-unit dwellings, high-rise apartment districts, and redevelopment districts are located. A residential zone may include areas containing accommodations for transients such as motels and hotels and residential areas with limited office development, but it may not include retail shopping facilities. 'Residential zone' includes hospitals, nursing homes, and similar institutional facilities."

b. Commercial Zone

--"An area where offices, clinics, and the facilities needed to serve them are located;

--"An area with local shopping and service establishments located within walking distances of the residents served;

--"A tourist-oriented area where hotels, motels, and gasoline stations are located;

--"A large integrated regional shopping center;

--"A business strip along a main street containing offices, retail businesses, and commercial enterprises;

--"A central business district; or

--"A commercially dominated area with multiple-unit dwellings."

c. Light Industrial Zone

--"An area containing clean and quiet research laboratories;

--"An area containing light industrial activities which are clean and quiet;

--"An area containing warehousing; or

--"An area in which other activities are conducted where the general environment is free from concentrated industrial activity."

d. Industrial Zone

". . . an area in which noise restrictions on industry are necessary to protect the value of adjacent properties for other economic activity but shall not include agricultural operations."

In addition to the above definitions, railroad rights-of-way are to be considered as industrial zones, and construction projects are subject to industrial zone noise levels for the duration of their building permits or, in the absence of a building permit, for a reasonable time for completion. The noise levels set out below are not applicable, however, "to the use of property for purposes of conducting speed or endurance events involving motor or other vehicles" during such use as authorized by local governments. Similarly, the noise levels do not apply to the "operation of aircraft or to other activities which are subject to federal law with respect to noise control."

No land use activity may produce noise which is objectionable "due to intermittance, beat frequency or shrillness." Furthermore:

"Sound levels of noise radiating from a property line at a distance of twenty-five feet or more therefrom in excess of the db(A) established for the following time periods and zones shall constitute prima facie evidence that such noise is a public nuisance:

Zone	7:00 a.m. to next 7:00 p.m.	7:00 p.m. to next 7:00 a.m.
Residential	55 db(A)	50 db(A)
Commercial	60 db(A)	55 db(A)
Light Industrial	70 db(A)	65 db(A)
Industrial	80 db(A)	75 db(A)

"In the hours between 7:00 a.m. and the next 7:00 p.m., the noise levels permitted [above] may be increased by ten db(A) for a period of not to exceed fifteen minutes in any one-hour period.

"Periodic, impulsive, or shrill noises shall be considered a public nuisance when such noises are at a sound level of five db(A) less than those listed [above]."

In addition to the above limitations on land use activities, there is a statutory prohibition against the sale of new vehicles which exceed 84 db(A) to 88 db(A) "at a distance of fifty feet from the center of the land of travel or fifty feet or more from a vehicle designed for off-highway use, under test procedures established by the department of revenue." Furthermore, counties or municipalities may regulate noise levels from larger trucks or motorcycles in accordance with certain statutory standards.

Enforcement of the above standards may be by civil action for injunction by any resident of the state. If such an injunction is obtained and then violated, the violation is punishable as a contempt of court by a fine of one hundred to two thousand dollars per day. If the mere availability of private enforcement actions should not be adequate, municipalities may adopt regulations which are no less restrictive than the statutory standards without fear of preemption.

6. Roadside Advertising (§43-1-401, et seq.)

Pursuant to the "Outdoor Advertising Act," administered by the chief engineer of the

Division of Highways, it is illegal to erect, use or maintain certain advertising devices without obtaining a license or a permit. An "advertising device":

> ". . . means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other contrivance designed, intended, or used to advertise or to give information in the nature of advertising and having the capacity of being visible from the travel way of any state highway, except any advertising device on a vehicle using the highway. The term 'vehicle using the highway' does not include any vehicle parked near said highway for advertising purposes."

In general, the provisions of the act apply to advertising devices which are "designed, intended, or used to advertise . . . to the public traveling on the main-traveled way of the state highway system. The state highway system shall consist of the federal-aid primary roads, the federal-aid secondary roads, and the interstate system, including extensions thereof within urban areas, plus an amount not to exceed five percent of the mileage of such systems which may be declared to be state highways by the state highway commission while not being a part of any federal system." Exceptions to the Act's requirements include certain directional and official advertising devices and notices conforming to division of highway standards, devices advertising the property on which they are located for sale or lease, or advertising activities conducted on that property or devices located in areas zoned, "under authority of stae law," as industrial or commercial.

After July 1, 1970, anyone in the "business of outdoor advertising" must obtain a license from the division of highways. Applications for the annual license must be filed with the division by June 1 of each year, along with a one hundred fifty dollar fee and a bond in the amount of $500.00 to $2500.00, depending on the number of signs to be erected or maintained.

A permit from the division of highways must be obtained by anyone who, on or after January 1, 1971, displays, uses, or maintains an advertising device. Although a permit may not be obtained for an advertising device not in existence on January 1, 1971, the following devices do not need permits: devices advertising the property on which they are located for sale or lease, or advertising activities conducted on that property, or devices located in areas zoned, "under authority of state law," as industrial or commercial. Such permits are good for one calendar year and are obtained by filing an application, accompanied by a fee of five dollars, including the following information:

--"The name and address of the applicant;

--"The type and location of the advertising device, the dimensions of the advertising area thereof, and such other pertinent information as may be prescribed;

--"Name and address of lessor of property upon which the device has been or will be located;

--"If previously erected, the year in which the advertising device was erected;

--"An agreement by the applicant to erect and maintain the advertising device in a safe, sound, and good condition;

--"A copy of any applicable local government permit or other evidence of approval."

The permit is required, of course, for each advertising device or location, which may not contain "more than two signs per facing or exceed sixty lineal feet in length." A subsequent permit, renewing the original, may be obtained by application, accompanied by a fee of $2.50, filed before December first. Permit numbers must appear on the advertising device. In addition to prohibiting advertising devices on Independence Pass, the Act also prohibits the issuance of permits for devices which stimulate any official governmental traffic signals or directional, traffic control or warning signs, for devices attached to any natural objects, fences or utility poles, for any unsafe or unsightly device, or for any device which is or would be:

--"At a point where it would encroach upon the right-of-way of a public highway;

--"Along the highway within five hundred feet of the center point of an intersection of such highway at grade with another highway or with a railroad in such manner as materially to obstruct or reduce the existing view of traffic on the other highway or railroad trains approaching the intersection and within five hundred feet of such center point;

--"Along a highway at any point where it would reduce the existing view of traffic in either direction or of traffic control or directional signs to less than five hundred feet;

--"Used or intended to be used for more than two advertisements facing in the same direction."

Permit holders may change advertising copy, ornamentation, or trim and may repair, replace, and maintain damaged signs. The Act does provide for the termination of "nonconforming advertising devices," which are "any advertising device which, on July 1, 1971, was erected and maintained in accordance" with the Act and was not exempted by the Act. Any nonconforming device may be maintained on the same land area, without increase, as it was on July 1, 1971, except that the dimensions of the device may not be increased and no material change may be made in its aspect or character. The limited right to maintain a nonconforming device is terminated by:

--"Abandonment of the nonconforming advertising device;

--"Increase of any dimension of the nonconforming advertising device over its dimensions on July 1, 1971;

--"Change of any aspect of or in the character of the nonconforming advertising device;

--"Failure to comply with the provisions of section 43-1-413, concerning permits for the maintenance of advertising devices;

--"Damage to or destruction of the nonconforming advertising device from any cause whatsoever, except by willful destruction, where the cost of repairing the damage of destruction exceeds fifty percent of the replacement cost of such device on the date of damage or destruction;

--"Obsolescence of the nonconforming advertising device where the cost of repairing the device exceeds fifty percent of the replacement cost of such device on the date that the division of highways determines that the device is obsolete;

--"Failure of the nonconforming advertising device to comply with any applicable zoning ordinance."

The division of highways has promulgated regulations which must include:

--"Standards for minor repairs to nonconforming advertising devices which are permissible under this section;

--"Standards for the maintenance and upkeep of nonconforming advertising devices, the violation of which shall constitute obsolescence of the device."

In compliance with the federal Highway Beautification Act of 1965, the division of highways may remove nonconforming devices and all appurtenant property rights by gift, purchase, agreement, or eminent domain. Compensation must be paid for such devices lawfully in existence on July 1, 1971, if a permit was issued for the device on or before January 1, 1971. The executive director of the state Department of Highways may enter into an agreement with the Secretary of Transportation for removal of nonconforming devices. The agreement must include a plan for their removal before January 1, 1976, by payment of compensation shared by the federal government.

In addition, it is generally unlawful to:

> ". . . erect or maintain, upon or along any public highway of the state outside the limits of any incorporated town or city, any billboard or any advertising sign within the distance of three hundred feet from intersecting corners of such public highways or upon or along any sharp curve in any such highway in such manner as to obstruct the full view of such curve or intersecting highway by travelers on the highways."

7. Junkyards Adjacent to Highways (§43-1-501, *et seq.*)

After February 11, 1966, a permit is required to establish, operate, and maintain a "junkyard" which is within one thousand feet from a highway and which is visible from the main-traveled way thereof, unless zoned industrial "under the authority of state law, or any of its political subdivisions." After payment of a twenty-five dollar fee, permits are issued by the department of highways when:

> ". . . such junkyard can be effectively screened, as required by regulation, by natural objects, plantings, fences, or other appropriate means so as not to be visible from the main-traveled way of such highways. Such screening shall be at the expense of the person applying for said permit."

With respect to noncomplying junkyards already in existence on February 11, 1966, the department of highways at its expense may screen the junkyard or may remove the junkyard from sight.

8. Register of Historic Places (§24-80.1-101, *et seq.*)

In H.B. 1561 (1975), the General Assembly created the state register of historic properties which is administered by the state historical society.

a. "Properties"

The "resources, including buildings, structures, objects, sites, districts, or areas that are of historical significance."

b. "Historical Significance"

"[H]aving importance in the history, architecture, archeology, or culture of this state or any political subdivision thereof or of the United States, as determined by the society."

c. Inclusion in State Register

(1) Automatic

That property included in the national register of historic places maintained pursuant to 16 U.S.C. 470a.

(2) Nomination and Acceptance

(a) Nomination may be made by the owner, a local government, a state agency or the historical society. In all cases, the owner's approval is required.

(b) Only the society may accept for inclusion in the register, after considering, inter alia:

--"The association of such property with events that have made a significant contribution to history;

--"The connection of such property with persons significant in history;

--"The apparent distinctive characteristics of a type, period, method of construction, or artisan;

--The geographic importance of the property;

--The possibility of important discoveries related to prehistory or history."

d. Effect of Register

(1) Nomination, alone, as well as inclusion in the register, protects properties for any action initiated by a state agency, pending a final determination of the effect of the action.

(2) State agencies (principal departments as provided in §24-1-110) must request a "determination of effect" from the historical society either:

(a) "At the earliest stage of planning or consideration of a proposed action or when it is anticipated that properties of historical significance may be adversely affected in the course of an agency action" and

(b) "In all cases prior to an agency decision concerning an action that may have an effect on properties listed in the state register."

e. Agency Actions Covered

". . . any state activity, program, project, or undertaking or the approval, sanction, assistance, or support of any activity, policy, program, project, or undertaking, including but not limited to:

(1) "Recommendations or reports relating to legislation, including requests for appropriations;

(2) "New and continuing activities, programs, projects, or undertakings directly engaged in by agencies or supported in whole or in part through state

contracts, grants, subsidies, loans, or other forms of funding assistance or involving a state lease, permit, license, certificate, or other entitlement of use;

(3) "The sale or transfer of state properties;

(4) "Comprehensive or area-wide planning in which provisions may be made for any actions or which may result in a proposed action."

f. Basis, Contents, and Effect of Society Determination of Effort

(1) "Effect" means "any change in the quality of the historical, archeological, or architectural character that qualified property in the state register."

(2) The agency must either implement or reject any of the society's "specific recommendations to prohibit or alter all or some aspects of the proposed action."

(3) If the agency rejects the society's recommendation, the statute provides a thirty-day period for a negotiation of the differences between the agency and the society.

(4) If negotiations are unsuccessful, the governor has thirty days to make a final determination.

9. Historical, Prehistorical, and Archeological Resources (§24-80-401, *et seq*.)

Since the state of Colorado has reserved to itself all title to "historical, prehistorical and archeological resources" in any areas owned by itself or its political subdivisions, it is important to remember that investigation, excavation, gathering or removal of such resources, as well as those in private areas upon the owner's request, must be pursuant to a permit issued by the State Historical Society. Such permits will contain, inter alia, the following stipulations:

> --"The investigations, excavations, gatherings and removals shall be undertaken only for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such resources; and such activities shall be conducted for permanent preservation, either on the site or in museums, open to the public and available to qualified students.
>
> --"All permit holders shall provide the state archaeologist, within one year after the start of the investigation, excavation, gathering, or removal, with a preliminary report of progress. If such activity continues for more than one year, an annual progress report shall be made. The permit holder shall furnish a final report of the activity undertaken within three years after termination of the field work.
>
> --"An inventory of all materials recovered during the course of the investigation, excavation, gathering, or removal shall be supplied to the state archaeologist.
>
> --"Upon receipt of the final report of the activity undertaken by a permit holder, the state archaeologist may require that a representative collection of the materials recovered be delivered to the state of Colorado and shall determine a repository for the same.
>
> --"Any permit issued by the society may be revoked by the society, pursuant to article 4 of this title, at any time if there is evidence that the activity authorized by the permit is being unlaw-

fully or improperly conducted or if the permit holder does not honor the conditions of the permit. When a permit is revoked, all recovered materials, catalogues, maps, field notes, and other records necessary to identify the same shall be surrendered immediately to the society."

10. Driveways on State Highways (§42-4-115)

After July 1, 1971, and after the effective date of rules and regulations promulgated by the Department of Highways, one must obtain a permit from either the department or "the local authority having jurisdiction for the regulation of traffic" in order to construct or maintain any driveway providing access to or from a state highway. Driveways are to be designed and located in accordance with the department's driveway code, which takes into consideration, *inter alia*, the public safety, traffic volume, type of traffic, drainage, character, and use of adjoining land. With respect to those driveways already in existence on July 1, 1971, the department or the local authority may require reconstruction or relocation because of changes in use of the abutting property, the driveway operations, or road and traffic conditions.

11. Discrimination(§23-34-401, *et seq*., 501, 701)

Under the provisions of the Colorado Fair Housing Act of 1959, it is unlawful to discriminate with respect to housing on the basis of race, creed, color, sex, marital status, religion, national origin, or ancestry, except where compliance with local zoning is predicated on marital status. Complaints of discrimination are made to the Colorado Civil Rights Commission. Similar provisions exist with respect to discrimination in "places of public accommodation" on the basis of race, creed, color, sex, national origin, or ancestry.

12. Ghost Towns (§24-80-1201, *et seq*.)

Unless there is objection by the owner, the State Historical Society may "designate any appropriate area within the state" as a ghost town. After designation, the society must erect the signs, markers, or plaques necessary, inter alia, "to apprise persons of the designation." Subsequently, only the owner or his designated agent may destroy, damage, or take anything from the area without being subject to conviction of a misdemeanor punishable by a fine of $2000 and/or up to six months' imprisonment.

13. Nuclear, Radioactive, and Toxic Material (§25-11-101, et seq.)

With certain exceptions, it is unlawful to "acquire, own, possess, or use" any "radioactive material" without a license from the Department of Health or to "use, manufacture, produce, transport, transfer, receive, send, acquire, own or possess" a "source of ionizing radiation" unless the person who does so is licensed by or registered with the Department of Health. Acting as the state's radiation control agency, the Department of Health is the only state agency authorized to "issue licenses pertaining to radioactive materials and require registration of other sources of ionizing radiation."

Permits from the Water Quality Control Commission are required to "discharge, deposit, generate, or dispose of any radioactive, toxic, or other hazardous waste underground in liquid, solid, or explosive form . . ."

14. Cemeteries (§12-12-101, et seq.)

The State Cemetery Board supervises commercial or "endowment care" cemeteries to which licenses are issued by the Department of Regulatory Agencies. All cemeteries established or acquired after July 1, 1965, and within twenty miles of a city of 5,000 population must be organized as an endowment care cemetery. All such cemeteries must be "surveyed into blocks, lots, avenues, and walks and platted" and filed with the county clerk and recorder. In addition, each endowment cemetery must file an annual report with the State Cemetery Board.

While counties have the power of eminent domain to acquire cemetery sites, cemeteries may be vacated by the appropriate district court upon petition by the municipality or county in which they are located.

15. Public Utilities (§40-1-101, *et seq.*; 40-2-101, *et seq.*; 40-3-101, *et seq.*; 40-4-101, *et seq.*; 40-5-101, *et seq.*; 30-28-110, 111, 127; 30-23-109; 24-65.1-101, *et seq.*)

"Public utilities" are regulated by the Public Utilities Commission which is concerned with the regulation of rates and charges, service, and equipment, etc. Of particular interest to land use professionals is the interrelationship between regulation by the P.U.C. and local land use regulation. The P.U.C. acts in two ways of interest here. First, it may require utilities to make additions, extensions, repairs, improvements, or changes in equipment, facilities, or structures when the P.U.C. finds such to be necessary for adequate service. Second, before a public utility may construct a new facility or plant or make any extension thereof, it must obtain a certificate of public convenience from the P.U.C. In order to obtain this certificate, the utility must obtain "the required consent" of the county or municipality, or the certificate will be conditioned on obtaining that consent.

The effect of the relationship between localities and public utilites is based on the type of police power regulation exercised by the locality. For example, once a county or regional "master plan" is adopted:

> ". . . no public utility, whether publicly or private owned, shall be constructed or authorized in the unincorporated territory of the county until and unless the proposed location and extent thereof has been submitted to and approved by such county or regional planning commission."

The P.U.C. may overrule the county or regional planning commission, however, by a majority vote. Essentially the same provisions exist for municipal master plans. Unfortunately, a 1954 decision of the Colorado Supreme Court appears to deny this approach. In that case, a property owner tried to stop the condemnation of her land because, among other reasons, the proposed electric generating plant and its location had not been approved by the county planning commission. Citing the same statute, the court held that planning commission approval was not necessary because the property was already zoned for industrial purposes, including power plants. It should be remembered that this case deals only with condemnation and not with the subsequent use of the land which probably will still require planning commission approval. The court took pains, however, to point out that approval before condemnation was actually completed since the precise extent and location of the property could not be determined.

Once a county has adopted its "zoning plan," consisting of the zoning resolution and maps, then:

> ". . . all extensions, betterments, or additions to buildings, structures, or plant or other equipment of any public utility shall only be made in conformity with such plan, unless, after public hearing first had, the public utilities commission orders that such extensions, betterments, or additions to buildings, structures, or plant or other equipment are reasonable and that such extensions, betterments, or additions may be made even though they conflict with the adopted plan."

No similar provision appears to exist for municipalities.

Under House Bill 1041, several matters of state interest involve potential conflicts with public utilities. The most glaring of these is "site selection and construction of major facilities of a public utility," which include:

--"Central office buildings of telephone utilities;

--"Transmission lines, power plants, and substations of electrical utilities; and

--"Pipelines and storage areas of utilities providing natural gas or other petroleum derivatives."

As mentioned elsewhere, after local designation and adoption of guidelines and regulations for administration, site selection and construction of such facilities can be carried out only under a permit from the local government. The statute goes on to provide, however:

> "With regard to public utilities, nothing in this article shall be construed as enhancing or diminishing the power and authority of municipalities, counties, or the public utilities commission. Any order, rule, or directive issued by any governmental agency pursuant to this article shall not be inconsistent with or in contravention of any decision, order, or finding of the public utilities commission with respect to public convenience and necessity. The public utilities commission and public utilities shall take into consideration and, when feasible, foster compliance with adopted land use master plans of local governments, regions, and the state.
>
> "Nothing in this article shall be construed as enhancing or diminishing the rights and procedures with respect to the power of a public utility to acquire property and rights-of-way by eminent domain to serve public need in the most economical and expedient manner."

16. Disaster Prevention (§28-2-101, et seq.)

Under the provisions of the Colorado Disaster Emergency Act of 1973, the governor as well as his Disaster Emergency Council are given broad authority in responding to "disasters." In addition, the Division of Disaster Emergency Services within the Department of Military Affairs is responsible for preparation and maintenance of a state disaster plan, including:

--"Prevention and minimization of injury and damage caused by disasters;

--"Search for, rescue of, and recovery of persons lost, entrapped, victimized, or threatened by disaster;

--"Prompt and effective response to disasters;

--"Disaster and emergency relief;

--"Identification of areas particularly vulnerable to disasters;

--"Recommendations for zoning, building, and other land use controls, safety measures for securing mobile homes or other nonpermanent or semipermanent structures, and other preventive and preparedness measures designed to eliminate or reduce disasters or their impact;

--"Assistance to local officials in designing local emergency action plans;

--"Authorization and procedures for the erection or other construction of temporary works designed to protect against or mitigate danger, damage, or loss from flood, conflagration, or other disaster;

--"Preparation and distribution to the appropriate state and local officials of state catalogs of federal, state, and private assistance programs;

--"Organization of manpower and chains of command for disaster emergencies;

--"Coordination of federal, state, and local disaster activities; and

--"Coordination of the state disaster plan with the disaster plans of the federal government."

Furthermore, the division is to take an active part in local and interjurisdictional disaster planning, including regulation of its contents. Municipalities designated by the division, as well as all counties, must have disaster agencies, as well as their own disaster plans, unless the governor requires the establishment of joint, interjurisdictional agencies.

Of interest to land use professionals is the governor's power to require state agencies to study the disaster-related aspects of floodplain management, stream encroachment and flow regulation, weather modification, fire prevention and control, air quality, public works, land use and land use planning, and construction standards. In particular, the Department of Natural Resources, in conjunction with the Division of Disaster Emergency Services, must continually study land use and construction and must identify areas which are particularly susceptible to "severe land-shifting, subsidence, flood, or other catastrophic occurrences." If the division should find that a particular area is "susceptible to a disaster of catastrophic proportions without adequate warning" and that applicable land use controls and building standards are not only inadequate but also could add to the disaster's magnitude and that other such controls or standards are essential, then the division must "specify the essential changes to the governor." The governor may, after public hearing, pass on the recommendation to the responsible agencies or local governments. If no adequate action is taken, the governor may inform the general assembly and request appropriate legislative action. At the same time as he makes his recommendations, he may suspend the inadequate standards and controls and "by regulation place a new standard or control into effect" to be administered by the appropriate state agencies and local governments.

17. Housing Development and Financing (§29-4-701, *et seq.*)

In 1973, the General Assembly created the independent Colorado Housing Finance Authority which, if it determines that the plans for the development of any "housing facility" are financially feasible, may arrange financing for the project. Although such projects may not be designed in such a way as to concentrate low-income families in any one neighborhood, low-income families must be able to afford at least twenty-five percent of the project's units and low-income and moderate-income families must be able to afford at least seventy-five percent of the units. Every year the authority must submit a report to the governor and General Assembly.

18. Conservation Trust Fund (§30-11-122, 31-25-305, 31-25-219)

All local governments may create a conservation trust fund. Once legal funds are created, local governments are eligible to receive state funds appropriated annually by the General Assembly and distributed by the State Treasurer based on population. Moneys in the fund may be used only for the acquisition, development, and maintenance of "new conservation sites" which include:

> ". . . interests in land and water, acquired after establishment of a conservation trust fund pursuant to this section, for park or recreation purposes, for all types of open space including but not limited to floodplains, greenbelts, agricultural lands, or scenic areas, or for any scientific, historic, scenic, recreational, aesthetic, or similar purpose."

19. Protection of Fishing Streams (§33-5-101, et seq.)

Without the approval of the Wildlife Commission, no state agency may "obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries by any type of construction." To obtain approval, the agency must notify the commission at least ninety days prior to construction. The commission is to review all such notices to insure that the purposes of the following state policy are accomplished:

> "It is declared to be the policy of this state that its fish and wildlife resources, and particularly the fishing waters within the state, are to be protected and preserved from the actions of any state agency to the end that they be available for all time and without change in their natural existing state, except as may be necessary and appropriate after due consideration of all factors involved."

If the commission finds that the stream will be adversely affected, it must notify the agency within thirty days after commission receipt of the agency's notice. If the agency refuses to modify its plans as suggested by the commission, the agency has fifteen days to notify the commission. The disagreement may then be settled by the governor.

20. Endangered Species (§33-8-101, et seq.)

"Endangered species" are protected by statute and are identified by reference to a list maintained and kept current by the Wildlife Commission. The Division of Wildlife is authorized to carry out management programs for such species.

21. Recreational Land Preservation (§23-13-101, et seq.)

Under the Recreation Land Preservation Act of 1971, the General Assembly made it unlawful:

--"Within the recreation areas of the state to discharge untreated sewage upon the surface of the ground or in any waters of the state,

--"To deposit or bury refuse, on the public lands or waters within this state, except within areas or receptacles designated by the operator for this purpose;

--"To deposit refuse on private or public land in such a way that said refuse may be blown, carried, or otherwise transported from its point of deposit;

--"To willfully mar, mutilate, deface, disfigure, or injure beyond normal use any rocks, trees, shrubbery, wild flowers, or other features of the natural environment in recreation areas of the state;

--"To willfully cut down, uproot, break, or otherwise destroy any living trees, shrubbery, wild flowers, or natural flora in recreation areas of the state;

--"To build fires unless in compliance with rules and regulations of the board, to abandon or to leave fires unattended, or to store flammable liquids in a container which is not of a type ap-

> proved by the department in an organized campground or other recreation area subject to this article;
>
> --"In organized campgrounds or recreation areas to use any cleansing agents, whether organic or inorganic in nature, in waters of the state for any purpose, including but not limited to bathing, clothes washing, and similar activities, or to dispose of any water containing such agents on the surface of the ground within fifty feet of any waters of the state. Such water shall be disposed of in facilities provided by the operator or in the manner specified by the operator."

More specifically, with respect to sewage disposal in organized campgrounds and public accommodation facilities, the operator must provide and maintain sewage disposal facilities in accordance with rules and regulations of the state board of health. In recreation areas, sewage may be buried six inches deep at least one hundred feet away from surface waters with adequate environmental safeguards. Refuse disposal in organized campgrounds must be in waterproof and fly-proof containers or as prescribed by state or operator regulations or by removal from the area. Refuse in public accommodation facilities must be disposed of in accordance with state regulations. Edible food wastes, however, may be deposited on the ground if they will decay or be consumed by local fauna before an unhealthful or unpleasant aesthetic appearance sets in. Water supplies in organized campgrounds must conform to state standards.

In addition to prohibiting occupancy of a campsite within a recreational area for more than two weeks, the Act also includes the following requirements for group gatherings:

> "Any group of twenty-five or more persons assembled for a meeting, festival, social gathering, or other similar purpose in an organized campground or recreation area for a period which reasonably could have been anticipated to

exceed ten hours shall make provision for sewage, waste water, and refuse disposal in accordance with rules and regulations of the board. The organizers of and performers at any gathering in violation of this section shall be [guilty of a misdemanor]."

The Act shall be administered by the Department of Health, with the state board of health promulgating rules and regulations to implement it. Enforcement may be by complaint of any person or by the Department of Health, the Division of Wildlife, the Division of Parks and Outdoor Recreation, as well as to city, county, and district health departments or any peace officer. Violation is punishable by conviction of a misdemeanor and a fine of up to five hundred dollars.

The provisions of the Act are not to be construed in such a way to repeal or invalidate more stringent provisions by any governmental entity or agency.

22. Sewage Treatment Works (§25-8-704)

Sewage treatment works which will serve more than twenty persons may not be constructed or expanded unless the Water Quality Control Commission has approved their location, construction, and design, and a discharge permit has been issued. The suitability of the location depends on the area's long-range comprehensive plan as well as the consolidation of such works to avoid a proliferation of small sewage treatment works.

23. Construction Requirements for Places of Public Assemblage (§9-1-101, *et seq*.)

Statutory requirements include size and outward opening of doors in places of public assemblage, as well as fireproof stairways. "Safety glazing materials" are required under state law and may be required under local standards before building permits may be issued for construction involving "hazardous locations" in public, commercial, and residential buildings.

24. Design of Public Buildings (§9-5-101, et seq.)

Buildings and facilities constructed with funds of state or local governments from architectural drawings prepared after July 1, 1975, must conform to extensive statutory standards which are intended to make such buildings accessible to and functional for those handicapped by physical disabilities such as sight, hearing, etc., as well as by aging. Design criteria and standards apply to such things as grading, walkways, parking lots, ramps, doors, stairs, floors, restrooms, water fountains, telephones, elevators, light switches and other controls, room and office identification, door knobs, visual and audible warning signals, and lighting.

25. Mobile and Modular Homes (§24-32-701, et seq.; 24-32-909; 38-12-201, et seq.)

The State Housing Board must promulgate rules for "factory-built housing." All such housing subsequently built must bear the division's insignia of approval before being sold or offered for sale. Although structures bearing the insignia are deemed to comply with local regulations, local governments may adopt and enforce regulations which are not inconsistent with the state's.

The Mobile Home Landlord-Tenant Act sets forth the relation of mobile home park operators with their tenants in the areas of termination of occupancies, tenant meetings, and fees.

Based on the health department's broad powers to control disease, to abate nuisances, and to establish sanitary standards, the State Board of Health has adopted "Sanitary Standards and Regulations for Mobile Home Parks" which establish minimum standards for the maintenance, sanitation, occupancy, and use of mobile home parks without precluding localities from adopting more stringent provisions.

26. Discarded and Abandoned Articles (§18-13-106)

It is a criminal offense to abandon or discard anything, including refrigerators and motor vehicles, which has a capacity of one and one-half cubic feet and is difficult to open from the inside. Criminal sanctions also apply to the owner, lessee, or manager who allows such an item to remain on property under his control.

27. Vacation and Abandonment of Roads, Streets, and Highways (§43-2-106, 302, 303)

Vacation may be accomplished by municipalities or counties or by joint action if the roadway forms the boundary between two counties or between a county and a municipality. In spite of any vacation, the local government may reserve easements for utilities. Once a piece of property has access by a public road, however, it may not be left landlocked by any vacation. In general, upon vacation, the title to the land covered by the road vests in abutting owners.

The State Highway Commission may abandon state highways which shall then revert to the abutting landowners or shall become county highway or city street by local government action.

28. Auto and Tourist Camps, Hotels and Motels (§43-5-201, et seq.)

Annual licenses must be obtained from the Department of Revenue to own, operate, control, or lease an "auto camp" or a hotel.

29. Fences (§35-46-101, et seq.)

In agricultural areas fences are regulated to some extent by state law. Essentially, adjoining farmers and ranchers are obligated to share in the construction and maintenance of a common or partition fence which must be a "lawful fence":

> ". . . a well constructed three barbed wire fence with substantial posts set at a distance of approximately twenty feet apart, and sufficient to turn ordinary horses and cattle, with all gates equally as good as the fence, or any other fence of like efficiency."

Although it is unlawful to break fences or have gates open, fences which encroach on a person's land may be removed within one year after discovery. If a person maintains a lawful fence and if another's livestock breaks through the fence, he may recover his damages, which may be determined by an informal board of arbitration. The division of highways is responsible for maintenance of fences along highway rights-of-way.

30. Disputed Boundaries (§38-44-100, *et seq.*)

When the corners or boundaries of land are in dispute, are unknown, or have been destroyed, one or more landowners may have the boundaries and corners established in a statutory proceeding, which may be heard by the court itself or by a court-appointed commission or surveyors. The court may either establish the boundaries or recognize the existing boundaries if they have been acquiesced in for twenty years. If the parties do not wish to try a lawsuit to settle the matter, they may accomplish the same result by private, recorded agreement.

31. Condominiums (§38-33-101, *et seq.*)

Under the Condominium Ownership Act, ownership of condominium units is recognized, regardless of when created. Such ownership includes a separate unit of air space plus an undivided interest in common elements established by the recorded declaration for the condominium project. Upon proper notice to the county assessor, each unit is assessed separately; any tax lien from nonpayment of an assessment does not affect other units.

It is important to remember two things about condominiums. First, the subdivision regulation requirements of Senate Bill 35 apply to condominiums just as they do to more traditional subdivisions. Second, the condominium declarations and map (roughly comparable to subdivision restrictive covenants and plat) must be recorded. They are the basis of conveyances of individual condominiums as well as the basis for the existence and powers of any condominium owners' association.

32. Airspace Ownership (§41-1-107; 38-32-101; 38-33-101, et seq.

Although sovereignty in airspace rests in the state, actual ownership is vested in the owners of the underlying land surface. Those owners, however, may convey ownership in that airspace to others, which need not be contiguous to the land, as in the case of condominiums.

33. Geological Reports (§34-1-201, et seq.)

Any report concerning "geology" submitted to "any state agency, political subdivision of the state, or recognized state or local board or commission" must be prepared or approved by a "professional geologist."

34. Nuclear Detonations

By initiative amendment to the state constitution in 1974, the electors prohibited the underground placement or detonation of any "nuclear explosive device" unless approved by the voters "through enactment of an initiated or referred measure authorizing that detonation" as provided in article v, section 1 of the constitution.

35. Odors (§25-7-108)

While odors are theoretically an air pollution emission matter, it should be noted that they are regulated by the Department of Health. Very briefly, limitations on odor emissions depend on their source and the land use of the areas in which they are found. In residential and commercial areas, odors may not be so great as to be detected after the odorous air has been diluted with seven volumes of odor-free air. In all other areas, however, the above dilution is fifteen volumes. On the other hand, if the source is a manufacturing process or agricultural operation, dilution is not a test so long as the "best practical treatment, maintenance, and control currently available" is being used. Regardless of the source, however, a violation occurs if odor is detected after dilution of one hundred twenty-seven volumes of odor-free air.

36. Conservation Easements (S.B. 59, 1976; §38-30.5-101, *et seq*., C.R.S. 1973)

a. Definition

"'Conservation easement in gross'," for the purposes of this article, means a right in the owner of the easement to prohibit or require, a limitation upon, or an obligation to perform, acts on or with respect to a land or water area or air space above the land or water owned by the grantor appropriate to the retaining or maintaining of such land, water, or air space, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, recreational, forest, or other use or condition consistent with the protection of open land having wholesome environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value."

b. Nature

(1) Freely transferable.

(2) Interest in real property.

(3) Perpetual unless otherwise stated in creating instrument.

c. Creation

(1) Grantor

By deed from record owners "specifically stating the intention of the grantor to create such an easement under [§38-30.5-103]."

(2) Grantee

Only by grant to governmental entity or a 501(c)(3) charitable organization which is at least two years old.

(3) No Overlapping Purpose

"A conservation easement in gross is void if, at the time it is granted, a substantial purpose fulfilled by its creation is already required by an existing statute, ordinance, rule, or regulation of the federal government, the state of Colorado, or a political subdivision of the state of Colorado."

(4) Historical, Architectural, or Cultural Matters

"Conservation easements relating to historical, architectural, or cultural significance may only be applied to buildings, sites, or structures when the state historical society of Colorado certifies that such a building, site, or structure is listed in the national register of historic places or the state register of historic properties or has been designated as a landmark by a local government or landmarks commission under the provisions of the ordinances of the locality involved."

d. Interest Retained by Grantor

"All interests not transferred and conveyed by the instrument creating the easement shall remain in the grantor of the easement, including the right to engage in all uses of the lands affected by the easement which are not inconsistent with the easement or prohibited by the easement or by law."

e. Recordation Necessary

"Instruments creating, assigning, or otherwise transferring conservation easements in gross must be recorded upon the public records affecting the ownership of real property in order to be valid and shall be subject in all respects to the laws relating to such recordation."

f. Enforcement -- No Privity

"No conservation easement in gross shall be unenforceable by reason of lack of privity of contract or lack of benefit to particular land or because not expressed as running with the land."

g. Remedies

(1) Injunctive Relief

"Actual or threatened injury to or impairment of a conservation easement in gross or the interest intended for protection by such easement may be prohibited or restrained by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated by the grantor or by an owner of the easement."

(2) Money Damages

"In addition to the remedy of injunctive relief, the holder of a conservation easement in gross shall be entitled to recover money damages for injury thereto or to the interest to be protected thereby. In assessing such damages, there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, and environmental values."

h. Taxation

(1) The Easement Itself

"Conservation easements in gross shall be subject to assessment, taxation, or exemption from taxation in accordance with general laws applicable to the assessment and taxation of interests in real property."

(2) The Subordinate Estate

"Real property subject to one or more conservation easements in gross shall be assessed, however, with due regard to the restricted uses to which the property may be devoted."

(3) The Whole Equals the Sum of Its Parts

"The valuation for assessment of a conservation easement which is subject to assessment and taxation, plus the valuation for assessment of lands subject to such easement, shall equal the valuation for assessment which would have been determined as to such lands if there were no conservation easement."

i. No Impairment of Other Interest

(1) General

"No interest in real property cognizable under the statutes, common law, or custom in effect in this state prior to July 1, 1976, nor any lease or sublease thereof at any time, nor any transfer of a water right or any change of a point of diversion at any time shall be impaired, invalidated, or in any way adversely affected by reason of any provision of this article."

(2) Previous Conservation Easements

"No provision of this article shall be construed to mean that conservation easements in gross were not lawful estates in land prior to July 1, 1976."

(3) Public Utilities

"Nothing in this article shall be construed so as to impair the rights of a public utility, as that term is defined by section 40-1-103, C.R.S. 1973, with respect to rights-of-way, easements, or other property rights upon which facilities, plants, or systems of a public utility are located or are to be located."

II. REGIONAL LAND USE CONTROL

A. Planning and Management Regions

1. Creation of Regions

Established by Executive Orders dated November 17, 1972, and November 13, 1973, for the coordination of local, state, and federal planning activities.

2. The Thirteen Regions

a. Number 1:

(1) Logan County
(2) Morgan County
(3) Phillips County
(4) Sedgwick County
(5) Washington County
(6) Yuma County

b. Number 2:

(1) Larimer County
(2) Weld County

c. Number 3:

(1) Adams County
(2) Arapahoe County
(3) Boulder County
(4) Clear Creek County
(5) Denver County
(6) Douglas County
(7) Gilpin County
(8) Jefferson County

d. Number 4:

(1) El Paso County
(2) Park County
(3) Teller County

e. Number 5:

(1) Cheyenne County
(2) Elbert County
(3) Kit Carson County
(4) Lincoln County

f. Number 6:

(1) Baca County
(2) Bent County
(3) Crowley County
(4) Kiowa County
(5) Otero County
(6) Prowers County

g. Number 7:

(1) Pueblo County (7a)
(2) Huerfano County (7b)
(3) Las Animas County

h. Number 8:

(1) Alamosa County
(2) Conejos County
(3) Costilla County
(4) Mineral County
(5) Rio Grande County
(6) Saguache County

i. Number 9:

(1) Archuleta County
(2) Dolores County
(3) La Plata County
(4) Montezuma County
(5) San Juan County

j. Number 10:

(1) Delta County
(2) Gunnison County
(3) Hinsdale County
(4) Montrose County
(5) Ouray County
(6) San Miguel County

k. Number 11:

(1) Garfield County
(2) Mesa County
(3) Moffat County
(4) Rio Blanco County

l. Number 12:

(1) Eagle County
(2) Grand County
(3) Jackson County
(4) Pitkin County
(5) Routt County
(6) Summit County

m. Number 13:

   (1) Chaffee County
   (2) Custer County
   (3) Fremont County
   (4) Lake County

3. Relationship of Regions to State

Pursuant to Executive Order, dated June 25, 1974, the relations of state agencies to the planning and management regions were further defined, effective July 1, 1974:

"All departments of the State of Colorado, under their budgeting, management, and planning powers, shall institute a program to develop the new regions of the State by accomplishment of the following actions:

> "All constitutional and statutory agencies of the State carrying out functions which in any way affect local governments or citizens in local areas are to realign their functional substate areas to make them coincide with the thirteen State planning and management regions. Realignments are to be effective no later than January 1, 1975, unless exceptions have been granted by the new Office of State Planning and Budgeting. Agencies having difficulties meeting this objective are to report their difficulties, with proposed solutions, to the new Office of State Planning and Budgeting.
>
> "Following realignment of functional areas, agencies are to use the thirteen regions in all their planning, programming, budgeting, and reporting, to the end that the State may be able to develop uniform statistical and operational bases for all purposes and for all levels of activity.
>
> "Commencing with the next (1975-76) budget cycle, and all cycles thereafter, agencies are to consider the possibility of assigning portions of any proposed new personnel to field locations within the thirteen regions.

> "Departments are to conduct studies regarding the feasibility, together with the advantages and disadvantages, of decentralizing any or all of their current and future operations to locations outside of the Denver Metropolitan area. Such studies, with recommendations, are to be made ready for possible implementation commencing with the 1976-77 budget cycle.
>
> "Departments are to develop imaginative and innovative ideas for using and implementing the new regions of the State, and particularly for assisting the development of those regions outside the front range of the State. This shall include capital investment, as well as operating budget, ideas.

"The new Office of State Planning and Budgeting is designated as the coordinating agency for all State agency plans regarding use of the thirteen regions for State planning, programming, budgeting, and reporting purposes; and for studies on the feasibility and advisability of decentralizing current or future State operations to locations outside the Denver Metropolitan area.

"The Department of Local Affairs is designated as the coordinating agency for local and regional comprehensive planning within the thirteen regions."

4. Relationship of Regions to Federal Agencies: A-95 Review

a. Background

(1) Statutory Basis

Prepared in response to §401(a) of the Intergovernmental Cooperation Act of 1968, 42 U.S.C. §4231(a), under which the President was to ". . . establish rules and regulations governing the formation, evaluation, and review of Federal programs and projects having a significant impact on area and community development . . ."

A-95 is also based on §403 of the Intergovernmental Cooperation Act of 1968 as well as §204(c) of the Demonstration Cities and Metropolitan Development Act of 1966.

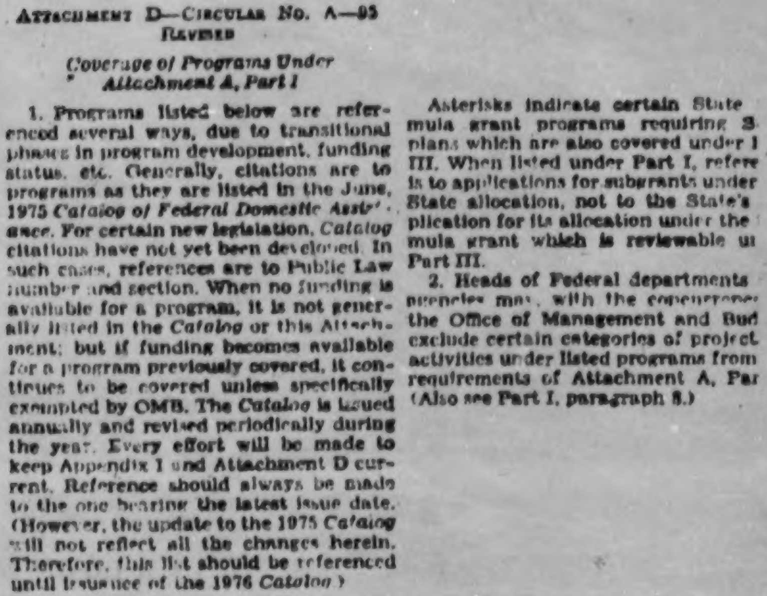
(2) Chronological Development

Originally the Bureau of the Budget (BOB) made the promulgation in 1969. Revisions were made by its successor, the Office of Management and Budget (OMB), in 1971 and 1972. The most recent version was issued this year. 41 F.R. 2052 (January 13, 1976).

b. Applicability of A-95

(1) Part I

"All projects and activities (or significant substantive changes thereto) for which Federal assistance is being sought under . . ." those programs listed in Attachment to A-95 or Appendix I of the Catalog of Federal Domestic Assistance, whichever bears a later date. The following excerpt from A-95 Attachment D offers an insight into Part I coverage:



ATTACHMENT D—CIRCULAR NO. A—95 REVISED

Coverage of Programs Under Attachment A, Part I

1. Programs listed below are referenced several ways, due to transitional phases in program development, funding status, etc. Generally, citations are to programs as they are listed in the June, 1975 *Catalog of Federal Domestic Assistance*. For certain new legislation, *Catalog* citations have not yet been developed. In such cases, references are to Public Law number and section. When no funding is available for a program, it is not generally listed in the *Catalog* or this Attachment; but if funding becomes available for a program previously covered, it continues to be covered unless specifically exempted by OMB. The *Catalog* is issued annually and revised periodically during the year. Every effort will be made to keep Appendix I and Attachment D current. Reference should always be made to the one bearing the latest issue date. (However, the update to the 1975 *Catalog* will not reflect all the changes herein. Therefore, this list should be referenced until issuance of the 1976 *Catalog*.)

Asterisks indicate certain State
mula grant programs requiring S
plans which are also covered under I
III. When listed under Part I, refere
is to applications for subgrants under
State allocation, not to the State's
plication for its allocation under the
mula grant which is reviewable u
Part III.

2. Heads of Federal departments
agencies may, with the concurrence
the Office of Management and Bud
exclude certain categories of project
activities under listed programs from
requirements of Attachment A, Par
(Also see Part I, paragraph 8.)

13.623 Runaway Youth.

13.624* Rehabilitation Services and Facilities Basic Support.

13.625 Rehabilitation Services and Facilities—Special Projects.

13.628 Child Development—Child Abuse and Neglect Prevention and Treatment.

13.630* Developmental Disabilities—Basic Support.

13.631 Developmental Disabilities—Special Projects.

13.633* Special Programs for the Aging—State Agency Activities and Area Planning and Social Services Programs.

13.634 Aging Programs Title III, Section 308, Model Projects.

13.635* Special Programs for the Aging—Nutrition Program for the Elderly.

13.636 Programs for the Aging—Research and Demonstration.

13.637* Programs for the Aging—Training.

P.L. 93-318: (Section 161) Construction of Academic Facilities.

P.L. 93-641. (Section 1516) Planning Grants to Health Systems Agencies; (Section 1601 *et seq.*, Title XVI Public Health Service Act) Assistance for modernization, construction or conversion of medical facilities. These programs will replace Catalog 13.206, 13.220, 13.240, and 13.253.

Department of Housing and Urban Development

14.001 Flood Insurance (Applications for community eligibility).

14.103 Interest Reduction Payments-Rental and Cooperative Housing for Lower Income Families.

14.105 Interest Subsidy—Homes for Lower Income Families.

14.112 Mortgage Insurance—Construction or Rehabilitation of Condominium Projects.

14.115 Mortgage Insurance—Development of Sales-Type Cooperative Projects.

14.116 Mortgage Insurance—Group Practice Facilities.

14.117 Mortgage Insurance—Homes.

14.118 Mortgage Insurance—Homes for Certified Veterans.

14.119 Mortgage Insurance—Homes for Disaster Victims.

14.120 Mortgage Insurance—Homes for Low and Moderate Income Families.

14.121 Mortgage Insurance—Homes in Outlying Areas.

14.122 Mortgage Insurance—Homes in Urban Renewal Areas.

14.124 Mortgage Insurance—Investor Sponsored Cooperative Housing.

14.125 Mortgage Insurance—Land Development and New Communities.

14.126 Mortgage Insurance—Management-Type Cooperative Projects.

14.127 Mortgage Insurance—Mobile Home Parks.

14.128 Mortgage Insurance—Hospitals.

14.129 Mortgage Insurance—Nursing Homes and Related Care Facilities.

14.134 Mortgage Insurance—Rental Housing.

14.135 Mortgage Insurance—Rental Housing for Moderate Income Families.

14.137 Mortgage Insurance—Rental Housing for Low and Moderate Income Families, Market Interest Rate.

14.138 Mortgage Insurance—Rental Housing for the Elderly.

14.139 Mortgage Insurance—Rental Housing in Urban Renewal Areas.

14.141 Nonprofit Housing Sponsor Loans—Planning Projects for Low and Moderate Income Families.

14.146 Public Housing — Acquisition (Turnkey and Conventional Production Methods.) (New construction only.)

14.149 Rent Supplements—Rental Housing for Lower Income Families.

14.164 Mortgage Insurance—Experimental Rental Housing.

14.156 Lower Income Housing Assistance Program.

14.203 Comprehensive Planning Assistance.

14.207 New Communities—Loan Guarantees.

14.218 Community Development Block Grants—Entitlement Grants.

14.219 Community Development Block Grants—Discretionary Grants.

14.703 State Disaster Preparedness Grants.

Department of the Interior

15.350 Coal Mine Health and Safety Grants.

15.400* Outdoor Recreation—Acquisition, Development and Planning.

15.501 Irrigation Distribution System Loans.

15.503 Small Reclamation Projects.

15.600 Anadromous Fish Conservation.

15.605 Fish Restoration.

15.611 Wildlife Restoration.

15.904 Historic Preservation.

Department of Justice

16.500 Law Enforcement Assistance—Comprehensive Planning Grants.

16.501 Law Enforcement Assistance—Discretionary Grants.

16.502* Law Enforcement Assistance—Improving and Strengthening Law Enforcement and Criminal Justice.

16.515 Criminal Justice Systems Development.

Appalachian Regional Commission

23.003 Appalachian Development Highway System.
23.004 Appalachian Health Demonstration.
23.005 Appalachian Housing Planning Loan Fund.
23.008 Appalachian Local Access Roads.
23.010 Appalachian Mine Area Restoration.
23.011 Appalachian State Research, Technical Assistance, and Demonstration Projects.
23.012 Appalachian Vocational Education Facilities and Operations.
23.013 Appalachian Child Development.
23.014 Appalachian Housing Site Development and Office State Improvement Grants.
23.015 Appalachian Vocational Education and Technical Education Demonstration Grants.

(NOTE.—Except for 23.011, administration of these grants is not in the Commission but in the appropriate program agency—e.g. 23.003 is handled by DOT. For 23.002, Appalachian Supplements to Federal Grants-in-aid, which can provide all or any portion of the Federal contribution under certain defined grant-in-aid programs, coverage under Part I is determined by the provisions applicable to the basic grant-in-aid program. For 28.003, 38.003, 48.003, 52.003, and 63.003—Regional Commission Supplements to Federal Grants-in-aid—the same rule would apply.)

Coastal Plains Regional Commission

28.002 Coastal Plains Technical and Planning Assistance.

(See note under Appalachian Regional Commission programs.)

Four Corners Regional Commission

36.002 Four Corners Technical and Planning Assistance.

(See note under Appalachian Regional Commission programs.)

National Science Foundation

47.036 Intergovernmental Science.

New England Regional Commission

45.002 New England Technical and Planning Assistance.

(See note under Appalachian Regional Commission programs.)

Community Services Administration

49.002 Community Action.
49.010 Older Persons Opportunities and Services.
49.011 Community Economic Development.

Ozarks Regional Commission

52.002 Ozarks Technical and Planning Assistance.

(See note under Appalachian Regional Commission programs.)

Upper Great Lakes Regional Commission

63.002 Upper Great Lakes Technical and Planning Assistance.

(See note under Appalachian Regional Commission programs.)

Veterans Administration

64.005 Grants to States for Construction of State Nursing Home Care Facilities.
64.017 Grants to States for Remodeling of State Home Hospital, Domiciliary Facilities.
64.020 Assistance in the Establishment of New State Medical Schools.
64.021 Grants to Affiliated Medical Schools—Assistance to Health Manpower Training Institutes.
64.114 Veterans Housing—Guaranteed and Insured Loans (GI Home Loans).

Water Resources Council

65.001 Water Resources Planning.

Environmental Protection Agency

66.001 Air Pollution Control Program Grants.
66.005 Air Pollution Survey and Demonstration Grants.
66.027 Solid Waste Planning Grants.
66.028 Solid Waste Demonstration Grants.
66.418 Construction Grants for Wastewater Treatment Works.
66.419 Water Pollution Control-State and Interstate Program Grants.
66.426 Water Pollution Control—Areawide Waste Treatment Management Planning Grants.
66.432 Grants for State Public Water System Subdivision Programs.
66.433 Grants for Underground Injection Control Programs.
66.505 Water Pollution Control Demonstration Grants.
66.506 Safe Drinking Water Research and Demonstration Grants. (Demonstration only).
66.600 Environmental Protection—Consolidated Program Grants.
66.602 Environmental Protection—Consolidated Special Purpose Grants.

Action

72.001 Foster Grandparents.
72.002 Retired Senior Volunteer Program.
72.008 The Senior Companion Program.

Old Western Regional Commission

75.002 Old West Technical and Planning Assistance.

Pacific Northwest Regional Commission

76.002 Pacific Northwest Technical and Planning Assistance Regulations.

13.369 Nursing School Construction—Loan Guarantees and Interest Subsidies.
13.378 Health Professions Teaching Facilities—Loan Guarantees and Interest Subsidies.
13.392 Cancer—Construction.
13.400* Adult Education—Grants to States.
13.401 Adult Education—Special Projects.
13.406* Construction of Public Libraries.
13.421 Educational Personnel Training Grants—Career Opportunities.
13.4 Educationally Deprived Children—Handicapped.
13.428* Educationally Deprived Children—Local Educational Agencies.
13.429* Educationally Deprived Children—Migrants.
13.433 Follow Through.
13.464* Library Services—Grants for Public Libraries.
13.477 School Assistance in Federally Affected Areas—Construction
13.493* Vocational Education — Basic Grants to States.
13.494* Vocational Education—Consumer and Homemaking.
13.495* Vocational Education—Cooperative Education.
13.499* Vocational Education — Special Needs.
13.501* Vocational Education—Work Study.
13.502* Vocational Education—Innovation.
13.516 Supplementary Educational Centers and Services—Special Programs and Projects.
13.519* Supplementary Educational Centers and Services, Guidance, Counseling, and Testing.
13.520 Special Programs for Children with Specific Learning Disabilities.
13.522 Environmental Education.
13.543 Educational Opportunity Centers.
13.570* Libraries and Learning Resources.
13.600 Child Development—Head Start.
13.612 Native American Programs.

3. *Covered programs:*

Department of Agriculture

10.405	Farm Labor Housing Loans and Grants.
10.409	Irrigation, Drainage, and Other Soil and Water Conservation Loans. (Exception: Loans to grazing associations to develop additional pasturage and loans for purchase of equipment.)
10.410	Low to Moderate Income Housing Loans.
10.411	Rural Housing Site Loans.
10.414	Resource Conservation and Development Loans.
10.415	Rural Rental Housing Loans.
10.418	Water and Waste Disposal Systems for Rural Communities.
10.419	Watershed Protection and Flood Prevention Loans.
10.420	Rural Self-Help Housing Technical Assistance.
10.422	Business and Industrial Development Loans. (Exception: Loans to rural small businesses having no significant impact outside community in which located.)
10.423	Community Facilities Loans.
10.424	Industrial Development Grants.
10.658	Cooperative Forest Insect and Disease Control.
10.901	Resources Conservation and Development. (Exception: Small projects costing under $7500 for erosion and sediment control and land stabilization and for rehabilitation and consolidation of existing irrigation systems.)
10.904	Watershed Protection and Flood Prevention.

Department of Commerce

11.300	Economic Development — Grants and Loans for Public Works and Development Facilities.
11.302	Economic Development — Support for Planning Organizations.
11.303	Economic Development—Technical Assistance.
11.304	Economic Development—Public Works Impact Projects (Procedural variation).
11.305	Economic Development—State and Local Economic Development Planning.
11.306	Economic Development—District Operational Assistance.
11.307	Economic Development—Special Economic Development and Adjustment Assistance Program.
11.308	Grants to States for Supplemental and Basic Funding of Title I, II, and IV Activities. (Basic grants only.)
11.405	Anadromous and Great Lakes Fisheries Development.
11.407	Commercial Fisheries Research and Development.
11.418	Coastal Zone Management Program Development.
11.419	Coastal Zone Management Program Administration.
11.420	Coastal Zone Management—Estuarine Sanctuaries.

Department of Defense

12.101	Beach Erosion Control Projects
12.106	Flood Control Projects.
12.107	Navigation Projects.
12.108	Snagging and Clearing for Flood Control.

Department of Health, Education, and Welfare

13.210*	Comprehensive Public Health Services—Formula Grants.
13.211*	Crippled Children's Services.
13.217*	Family Planning Projects.
13.224	Health Services Development—Project Grants.
13.232*	Maternal and Child Health Services.
13.235	Drug Abuse Community Service Programs.
13.237	Mental Health—Hospital Improvement Grants.
13.240	Mental Health—Community Mental Health Centers.
13.246	Migrant Health Grants.
13.251	Alcohol—Community Service Programs.
13.252	Alcohol Demonstration Programs.
13.254	Drug Abuse Demonstration Programs.
13.256	Office for Health Maintenance Organization (HMOS).
13.258*	National Health Service Corps.
13.259	Mental Health—Children's Services.
13.260	Family Planning Services—Training Grants.
13.261	Family Health Centers.
13.266	Childhood Lead-Based Paint Poisoning Control.
13.267	Urban Rat Control.
13.268	Disease Control—Project Grants.
13.275	Drug Abuse Education Programs.
13.284	Emergency Medical Services.
13.286	Limitation on Federal Participation for Capital Expenditures.
13.340	Health Professions Teaching Facilities—Construction Grants.

16.516	Law Enforcement Assistance—Juvenile Justice and Delinquency Prevention—Allocation to States.
16.517	Law Enforcement Assistance Administration—JJFD Special Emphasis Prevention and Treatment.

Department of Labor

17.211	Job Corps.
17.226	Work Incentives Program (WIN).
17.230	Farm Workers. (Procedural variation.)
17.232*	Comprehensive Employment and Training Programs.

Department of Transportation

20.102	Airport Development Aid Program.
20.103	Airport Planning Grant Program.
20.205	Highway Research, Planning, and Construction.
20.214	Highway Beautification—Control of Outdoor Advertising, Control of Junkyards, Landscaping and Scenic Enhancement.
20.500	Urban Mass Transportation Capital Improvement Grants. (Planning and construction only.)
20.501	Urban Mass Transportation Capital Improvement Loans. (Planning and construction only.)
20.505	Urban Mass Transportation Technical Studies Grants. (Planning and construction only.)
20.506	Urban Mass Transportation Demonstration Grants.
20.507	Urban Mass Transportation Capital and Operating Assistance Formula Grants.

(2) Part II

"All direct Federal development activities, including the acquisition, use, and disposal of Federal real property; in addition, agencies responsible for granting licenses and permits for developments or activities significantly affecting area and community development or the physical environment are strongly urged to consult with clearinghouses on applications for such licenses or permits." (emphasis added)

(3) Part III

"All Federal programs as listed in Appendix II of the Catalog of Federal Domestic Assistance requiring, by statute or administrative regulation, a State plan as a condition of assistance and certain multisource programs."

(4) Part IV

"All Federal programs providing assistance to State, areawide, or local agencies or organizations for multijurisdictional or areawide planning."

c. A-95 Review

(1) Clearinghouses

The circular provides for notification of as well as review and comment under Part I and Part II on the appropriate federal programs and activities. There are two types of clearinghouses:

(a) State Clearinghouse

The state clearinghouse, designated by the governor, is the Division of Planning of the Department of Local Affairs.

(b) Areawide Clearinghouses

(i) Non-Metropolitan

--"In non-metropolitan areas a comprehensive planning agency designated by the Governor . . . or by State law to carry out requirements of [A-95]."

--In Colorado, the non-metropolitan clearinghouses are the Planning and Management Regions, except for a few regions, for which the Division of Planning acts as the clearinghouse.

(ii) Metropolitan

--"In metropolitan areas an areawide agency that has been recognized by [OMB] as an appropriate agency to perform review functions under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, Title IV of the Intergovernmental Cooperation Act of 1968, and [A-95]."

--In Colorado, the metropolitan clearinghouses are Denver, Pueblo, and Colorado Springs.

(2) Clearinghouse Review

(a) Part I

(i) Notification

--Individuals, organizations, local governments, or state agencies wishing to apply for federal funding for certain projects are to notify the state clearinghouse as well as the areawide clearinghouse of their intention to apply for assistance.

(ii) Review

--The notified clearinghouse is to make its comments and recommendations to assure "maximum consistency of such project with State, areawide, and local comprehensive plans" and to assist the administering agency "in determining whether the project is in accord with applicable Federal law."

--The suggested subject matter of comments and recommendations are as follows:

"The extent to which the project is consistent with or contributes to the fulfillment of comprehensive planning for the State, area, or locality.

"The extent to which the proposed project:

> "Duplicates, runs counter to, or needs to be coordinated with other projects or activities being carried out in or affecting the area; or
>
> "Might be revised to increase its effectiveness or efficiency in relationship to other State, area, or local programs or projects.
>
> "The extent to which the project contributes to the achievement of State, areawide, and local objectives and priorities relating to natural and human resources and economic and community development as specified in section 401 of the Intergovernmental Cooperation Act of 1968, including:

"Appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes;

"Wise development and conservation of natural resources, including land, water, mineral, wildlife, and others;

"Balanced transportation systems, including highway, air, water, pedestrian, mass transit, and other modes for the movement of people and goods;

"Adequate outdoor recreation and open space;

"Protection of areas of unique natural beauty, historical and scientific interest;

"Properly planned community facilities, including utilities for the supply of power, water, and communications, for the safe disposal of wastes, and for other purposes; and

"Concern for high standards of design.

"As provided under section 102(2)(C) of the National Environmental Policy Act of 1969, the extent to which the project significantly affects the environment including consideration of:

"The environmental impact of the proposed project;

"Any adverse environmental effects which cannot be avoided should the proposed project be implemented;

"Alternatives to the proposed project;

"The relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity; and

"Any irreversible and irretrievable commitments of resources which would be involved in the proposed project or action, should it be implemented.

"The extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups.

"Effects on energy resource supply and demand.

"The extent to which people or businesses will be displaced and the availability of relocation resources.

"In the case of a project for which assistance is being sought by a special purpose unit of government, whether the unit of general local government having jurisdiction over the area in which the project is to be located has applied, or plans to apply for assistance for the same or a similar type project. This information is necessary to enable the Federal (or State) agency to make the judgments required under section 402 of the Intergovernmental Cooperation Act of 1968."

(b) Part II Review

Federal agencies are required to consult with the governor and appropriate clearinghouses so as to:

--Provide information on projected federal development to local and state governments in order to coordinate that development with state and local plans and programs,

--Provide information on state and local plans and programs to federal agencies "to assure maximum feasible consistency of federal developments with state, areawide, and local plans and programs,"

--"Provide federal agencies with information on the possible impact on the environment of proposed federal development."

(c) Part III Review

The purpose of review under Part III is to ensure that federal agencies are aware of the relationship between state or areawide comprehensive planning and:

--State plans (for the utilization of money) required as a condition of funding under certain federal programs which are set forth in Appendix II of the catalog of federal domestic assistance, by giving the governor the opportunity to comment on the relationship, or

--Any "multi-source programs" (involving two or more federal programs or funding authorities), by giving appropriate state and areawide clearinghouses the opportunity to comment on the relationship. OMB, in making its designation of such multi-source programs, has identified:

--Integrated Grant Administration (IGA).

--Unified Work Program (DOT 1130.2).

--Environmental Protection -- Consolidated Program Grants (EPA).

--Areawide Manpower Plans (DOL).

(d) Part IV Review

The purpose of review under Part IV is to eliminate duplication and inconsistencies as well as to encourage coordination between various federal, state, and local planning activities and jurisdictions.

Prior to the designation or approval of a planning and development district or region under any federal program, the appropriate federal agency will give the governor thirty days to review the boundaries and comment on their relationship to similar districts or regions established by the state. Where such state districts or regions have been formed, the federal districts or regions "will conform to them unless there is clear justification for not doing so."

(3) Individual Agency Procedures

Each agency is to promulgate their own proposed procedures to comply with A-95, no later than April 29, 1976.

(4) General Observations on A-95 Review

It should be emphasized that review under A-95 is:

--Not a veto process by which clearinghouses can block federal assistance or development.

--An excellent means by which to provide local input for federal decision-making.

--A requirement for many draft environmental impact statements, under Part I and Part II.

> --Part I clearinghouse review, relating to federal funding, includes the following function:
>
> > "Assuring, pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, that appropriate state, areawide, or local agencies which are authorized to develop and enforce environmental standards are informed of and are given opportunity to review and comment on the environmental significance of proposed projects for which federal assistance is sought."
>
> --Part II, relating to direct federal involvement, requires responsible federal agencies to establish procedures:
>
> > "Providing state, areawide, and local agencies which are authorized to develop and enforce environmental standards with adequate opportunity to review such federal plans and projects pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969. Any comments of such agencies will accompany the environmental impact statement submitted by the federal agency." (emphasis added)
>
> --Under CEQ Guidelines for EIS preparation (40 CFR 1500) as well as A-95, clearinghouses have an opportunity to comment on draft EIS's.

--Limited by the effectiveness of the notification which is given by the clearinghouse to other agencies, levels of government, and the public.

B. Regional Planning Commissions

1. Major Organized Entities

--Denver Regional Council of Governments, Region 3, consisting of the following counties: Denver, Adams, Arapahoe, Boulder and Jefferson. Douglas, Gilpin and Clear Creek counties are not members although they are within Planning and Management Region 3.

--San Juan Basin Regional Planning Commission, Region 9, consisting of the following counties: Dolores, Montezuma, La Plata, San Juan and Archuleta.

--Region 10 Regional Planning Commission, consisting of Gunnison, Delta, Montrose, Ouray, San Miguel and Hinsdale counties.

2. Primary Responsibilities

Preparation of broad regional master plans, as well as certain surveys and studies of matters which "clearly affect the development of two or more governmental units." 1973 C.R.S. 30-28-106(2), (3), 107, 131.

3. General Attributes

" . . . a body politic and corporate, with power to sue and be sued." 1973 C.R.S. 30-28-105(7).

a. Formation

(1) Formed by "cooperation" or combination of counties and/or municipalities. 1973 C.R.S. 30-28-105(1).
(2) Articles of Association. 1973 C.R.S. 30-28-105(8).
(3) Public Records. 1973 C.R.S. 30-28-106(8).

b. Membership and Officers

(1) Each participant gets at least one vote for a three-year term. 1973 C.R.S. 30-38-105(2), 128.

(2) Each participant may belong to more than one RPC. 1973 C.R.S. 30-28-105(10).
(3) At least a chairman. 1973 C.R.S. 30-28-105(2).

c. Revenue

(1) Appropriations by members. 1973 C.R.S. 30-28-105.
(2) Other, e.g., grants. 1973 C.R.S. 29-1-105(6).

4. General Powers of Regional Planning Commissions

a. Individualistic

(1) Enabling Act. 1973 C.R.S. 38-28-105.
(2) Intergovernmental Cooperation. 1973 C.R.S. 29-1-203.

b. The Organic Document

(1) Basis of Authority. 1973 C.R.S. 30-28-107(1).
(2) "Articles of Association," "Joint Resolution," "Agreement," etc.

c. Express Powers

(1) Conduct surveys and studies. 1973 C.R.S. 30-28-107.
(2) Prepare a regional comprehensive plan. 1973 C.R.S. 30-28-106(2), (3).
(3) Employ a staff. 1973 C.R.S. 30-28-105(5).
(4) Contract with consultants. 1973 C.R.S. 30-28-105(5).
(5) Contract with other governmental entities and agencies. 1973 C.R.S. 30-28-105(6).
(6) Receive and expend funds from all sources. 1973 C.R.S. 30-28-105(6).
(7) Provide matching funds for grants, etc. 1973 C.R.S. 30-28-105(6).
(8) Act as a county planning commission, upon the resolution of the county commissioners. 1973 C.R.S. 30-28-105(9), but see 1973 C.R.S. 30-28-133(1), indicating that each county must have its own planning commission.
(9) Request and accept the services of the staffs of county or municipal administrative departments. 1973 C.R.S. 30-28-105(3).

(10) Request local governments to make special studies or surveys for the RPC. 1973 C.R.S. 30-28-105(3).

(11) Exercise all other powers "necessary or incidental to exercise fully" the powers and authority set out above. 1973 C.R.S. 30-28-105(8).

5. Creation of the Regional Plan

a. Purpose of the Plan

The purpose of the RPC master plan is to guide and accomplish the "coordinated, adjusted, and harmonious development" of the region by promoting:

--"The health, safety, morals, order, convenience, prosperity, or general welfare of the inhabitants, as well as

--"efficiency and economy in the process of development, including such distribution of population and of the uses of land for urbanization, trade, industry, habitation, recreation, agriculture, forestry, and other purposes as

> --"will tend to create conditions favorable to health, safety, transportation, prosperity, civic activities, and recreational, educational, and cultural opportunities;
>
> --"will tend to reduce the wastes of physical, financial, or human resources which result from either excessive congestion or excessive scattering of population; and
>
> --"will tend toward an efficient and economic utilization, conservation, and production of the supply of food and water and of drainage, sanitary, and other facilities and resources." 1973 C.R.S. 30-28-107.

b. Preparation of the Regional Plan

(1) Surveys and Studies

Mandatory for "existing conditions and probable future growth." 1973 C.R.S. 30-28-107.

(2) Personnel

(a) Own staff. 1973 C.R.S. 30-28-105(5).
(b) Constituent Local Governments. 1973 C.R.S. 30-28-132(3).
(c) Consultants. 1973 C.R.S. 30-28-105(5).

(3) Inability to Perform

After request to RPC, local planning commission may act. 1973 C.R.S. 30-28-132(1).

6. Contents of Regional Plan

a. Discretionary

The master plan is to be comprised of "recommendations" for the development of the territory covered by the plan and may include a variety of matters such as:

--"The general location, character, and extent of streets or roads, viaducts, bridges, parkways, playgrounds, forests, reservations, parks, airports, and other public ways, grounds, places, and spaces;

--"the general location and extent of public utilities and terminals, whether publicly or privately owned, for water, light, power, sanitation, transportation, communication, heat, and other purposes;

--"the acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment, or change of use of any of the foregoing public ways, grounds, places, spaces, buildings, properties, utilities, or terminals;

--"the general character, location, and extent of community centers, townsites, housing developments, whether public or private, and urban conservation or redevelopment areas;

--"the general location and extent of forests, agricultural areas, flood control areas, and open development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, flood control, or the protection of urban development; and

--"a land classification and utilization program." 1973 C.R.S. 30-28-106(3)(a).

b. Mandatory Contents of Regional Plan

(1) Master plan for extraction of commercial mineral deposits. 1973 C.R.S. 34-1-304, 30-28-106(3)(c).
(2) Coordination with regard to coverage of mass transportation. 1973 C.R.S. 30-28-106(3)(b).

7. Adoption and Amendment of the RPC Plan

(1) Adoption in whole or in part by resolution of majority of members and certified to the commissioners of all member counties as well as the planning commissions of all member municipalities. 1973 C.R.S. 30-28-107, 109.
(2) Amended by same procedure. 1973 C.R.S. 30-28-107.

8. Effect of the Regional Plan

a. Adoption by Constituent Governments

Must be adopted by local planning commissions and municipal governing bodies. 1973 C.R.S. 30-28-106(2)(b), 109, 106(2)(a).

b. Submission Requirements

(1) Applies to developments before July 1, 1971. 1973 C.R.S. 30-28-133(1).

(2) Specifically, RPC approval was required for:

--Outside of municipal boundaries, any road, park, or other public way, ground or space, any public building, or structure, or any public utility, whether publicly or privately owned. 1973 C.R.S. 30-28-110(1)(a).

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--"The acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment, change of use, or sale or lease of or acquisition of land for any road, park, or other public way, ground, place, property, or structure . . ." 1973 C.R.S. 30-28-110(1)(d).

(3) Upon RPC disapproval, the county or other authority could override. 1973 C.R.S. 30-28-110(1)(b), (1)(c).

c. Referral Requirements

(1) Nonlocal Matters

(a) Presently, once the RPC adopts the plan, any local planning commission must refer to the RPC for its review:

"land use plan, zoning amendments, subdivision proposals, housing codes, sign codes, urban renewal projects, proposed public facilities, or other planning functions which clearly affect another local governmental unit, or which affect the region as a whole, or which are the subject of primary responsibility of the regional planning commission." 1973 C.R.S. 30-28-110(2)(a), (b).

(b) RPC has thirty days to report back "on the effect of the referred matter on the regional plan." 1973 C.R.S. 30-28-110(2)(c). Failure to respond constitutes approval. 1973 C.R.S. 30-28-110(2)(d).

(c) If RPC finds an inconsistency, the local planning commission may issue an independent report on two-thirds vote. 1973 C.R.S. 30-28-110(2)(c).

(d) Failure of the locality to refer a matter to the RPC is a determination that the matter is local in nature. 1973 C.R.S. 30-28-110(2)(e).

(2) County Action Affecting Municipalities

County referrals to the RPC of preliminary plans for developments within two miles of a municipal boundary must be followed by recommendations of the municipality. 1973 C.R.S. 30-28-110 (5)(a), (b).

(3) Exceptions from Referral and Review

"any proposed business or industrial zoning change of less than twenty acres [or] any proposed residential zoning change or subdivision of less than forty acres." 1973 C.R.S. 30-28-110(2)(g).

d. Regional Planning Commission Review

On its own initiative of any matter affecting two or more jurisdictions. 1973 C.R.S. 30-28-110(2)(f).

C. Councils of Government

1. Organized Entities

There are twelve entities in the state which style themselves "Councils of Government":

--Northeastern Colorado Council of Governments, contiguous with Planning and Management Region 1, encompassing Sedgwick, Phillips, Yuma, Logan, Washington and Morgan counties and including twenty-one municipalities.

--Larimer-Weld Regional Council of Governments, contiguous with Region 2, encompassing Larimer and Weld counties and including twenty-four municipalities.

--Denver Regional Council of Governments, covering part of Region 3, encompassing Denver, Adams, Arapahoe, Boulder and Jefferson counties and including thirty-one municipalities. Douglas, Clear Creek and Gilpin counties are not members.

--Pikes Peak Area Council of Governments, contiguous with Region 4, encompassing El Paso, Park and Teller counties and including eight municipalities.

--East Central Council of Governments, contiguous with Region 5, encompassing Lincoln, Elbert, Kit Carson and Cheyenne counties and including seven municipalities.

--Lower Arkansas Valley Council of Governments, contiguous with Region 6, encompassing Crowley, Kiowa, Otero, Bent, Prowers and Baca counties and including fourteen municipalities.

--Pueblo Area Council of Governments, covering part of Region 7a, including Pueblo county and three municipalities.

--Huerfano-Las Animas Area Council of Governments, covering part of Region 7b, encompassing Huerfano and Las Animas counties and including six municipalities.

--San Luis Valley Council of Governments, contiguous with Region 8, encompassing Saguache, Mineral, Rio Grande, Alamosa, Conejos and Costilla counties and including sixteen municipalities.

--Regions 9 and 10 are regional planning commissions.

--Colorado West Area Council of Governments, contiguous with Region 11, encompassing Garfield, Moffat, Mesa and Rio Blanco counties and twelve municipalities.

--Northwest Regional Council of Governments, contiguous with Region 12, encompassing Routt, Jackson, Grand, Summit, Eagle and Pitkin counties and including eighteen municipalities.

--Upper Arkansas Area Council of Governments, contiguous with Region 13, encompassing Lake, Chaffee, Fremont and Custer counties and including eight municipalities.

2. COG Enabling (?) Legislation

a. General

Although the term "Council of Governments" (COG) is nowhere used in the statutes, a general provision provides for typical COG intergovernmental cooperation as follows:

--"Governments may cooperate or contract with one another to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt, only if such cooperation or contracts are authorized by each party thereto with the approval of its legislative body or other authority having the power to so approve.

--"Any such contract shall set forth fully the purposes, powers, rights, obligations, and the responsibilities, financial and otherwise, of the contracting parties.

--"Where other provisions of law provide requirements for special types of intergovernmental contracting or cooperation, those special provisions shall control.

--"Any such contract may provide for the joint exercise of the function, service, or facility, including the establishment of a separate legal entity to do so." 1973 C.R.S. 29-1-203.

b. Specific

(1) Cooperating governments can delegate any of their powers and functions to the COG. 1973 C.R.S. 29-1-202.

(2) Governments may also cooperate "for the purposes of planning or regulating the use of land, including but not limited to the joint exercise of planning, zoning, subdivision, building, and related regulations." 1974 S.L., p. 354, adding 1963 C.R.S. 106-8-105, prospectively 1973 C.R.S. 29-20-105.

3. Delegation of Powers

a. The underlying contract (*e.g.*, "Articles of Association") must "set forth fully" the COG's "purposes, powers, rights, obligations, and responsibilities." 1973 C.R.S. 29-1-102(2).

b. Without specific delegation of powers by the cooperating governments, the COG simply does not have them. *See* Colo. Atty. Gen'l. Opn. #74-0036 (September 30, 1974).

4. Compliance with Other Provisions

a. The COG's organic document cannot override other statutory requirements. 1973 C.R.S. 29-1-203(3).

b. If the COG were empowered to act as a Regional Planning Commission or a Regional Health Department, it would need to comply with the enabling legislation for those entities.

III. LOCAL LAND USE CONTROL IN GENERAL

A. Delegation of State Powers

1. Local Land Use Control Tools

- a. Taxation
- b. Condemnation
- c. Police Power Regulation

2. General Tests for Exercise of Delegated Powers

a. Is there enabling legislation or constitutional delegation? City of Aurora v. Bogue, 176 Colo. 98, 489 P.2d 1295 (1971), Farnik v. Board of County Commissioners, 139 Colo. 481, 341 P.2d 467 (1959).

b. Has there been preemption? Gurghano v. Veltri, 180 Colo. 110, 501 P.2d 1044 (1972), Bennion v. City and County of Denver, 180 Colo. 213, 504 P.2d 350 (1972).

c. Have procedural requirements been scrupulously followed? McArthur v. Zabka, 117 Colo. 370, 494 P.2d 89 (1972).

3. Taxation

a. Can be legally effective land use control tool. City of Pittsburgh v. Alco Parking Corporation, ___ U.S. ___, 94 S.Ct. 2291 (1974).

b. Incomplete enabling legislation, as shown by the Tax Lead Time Study, The Colorado Oil Shale Region (1974), portions of which are summarized below:

Express Enabling Legislation

Type of Tax	Home Rule City	County	Statutory Municipality
General sales	Yes	Yes	Yes
Selective sales	Yes	No	No
Use	Yes	No	Yes
Ad valorem property	Yes	Yes	Yes

Type of Tax	Home Rule City	County	Statutory Municipality
General occupation	Yes	No	Yes
Specific occupation	Yes	No	Yes
Service user fees	Yes	Yes	Yes
Severance	No	No	No
Local income	No	No	No
Real estate transfer	?	No	No
Site value	?	No	No
Land value increment	No	No	No

4. Condemnation

a. Interests in land may not be taken or damaged for public use without just compensation. Colo. Const., Art. II, §15; U.S. Const., 5th Amend.

(1) "Public use" quite broad. Game & Fish Commission v. Farmers Irrigation Co., 162 Colo. 301, 426 P.2d 562 (1967), Potashnik v. Public Service Co., 126 Colo. 98, 247 P.2d 137 (1952).

(2) "Just Compensation"

(a) Liberally construed. Keller v. Miller, 63 Colo. 304, 165 P. 774 (1917).

(b) The loss sustained by the owner, rather than the value of the property gained by the taker. Alexander v. City and County of Denver, 51 Colo. 140, 116 P. 342 (1911), Williams v. City and County of Denver, 147 Colo. 195, 363 P.2d 171 (1961).

(c) Usually fair market value. Leadville Water Company v. Parkville Water Dist., 164 Colo. 362, 436 P.2d 659 (1967), Williams v. City and County of Denver, supra.

b. Potential Uses.

(1) Land Banking
(2) Land Use Banking

c. Enabling legislation fairly restrictive.

5. Police Power Regulations

   a. No compensation required.

   b. Must bear some relation to police power purposes: public health, safety, morals, and general welfare. *City and County of Denver v. Denver Buick, Inc.*, 141 Colo. 121, 347 P.2d 919 (1960).

   c. Must be reasonable. *City of Littleton v. Quelland*, 153 Colo. 515, 387 P.2d 29 (1963), *Board of County Commissioners of Jefferson County v. Simmons*, 177 Colo. 347, 494 P.2d 85 (1972).

   d. Constitutional issues.

      (1) Taking: can the land "be devoted to any reasonable, lawful use?" *City and County of Denver v. Chuck Ruwart Chevrolet, Inc.*, 32 Colo. App. 191, 508 P.2d 789 (1973), Bosselman, Callies and Banta, *The Taking Issue*, *Council on Environmental Quality*, U.S.G.P.O. (1973).

      (2) The right to travel and migrate.

      (3) Freedom of association.

      (4) Equal protection.

      (5) Due process.

6. Presumption of Validity

   Local governments enjoy a rebuttable presumption that their legislative enactments are valid. *Ford Leasing and Development Co. v. Board of County Commissioners of Jefferson County*, ____ Colo. ____, 528 P.2d 237 (1974).

B. Public Nuisance

1. Oldest form of land use legislation.

2. Non-statutory. *Echave v. City of Grand Junction*, 118 Colo. 165, 193 P.2d 277 (1948).

3. Statutory.

   a. Criminal sanctions. 1973 C.R.S. 16-13-301, *et seq*.

4. Permitted use under zoning is not a public nuisance. Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946), Green v. Castle Concrete Co., ____ Colo. ____, 509 P.2d 588 (1973).

C. Zoning

1. Traditional Euclidian zoning segregates uses to avoid nuisances.

2. Newer types of zoning:

    a. Zoning with compensation. Re Coleman Highlands, 401 S.W.2d 385 (Mo. 1966), City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969).

    b. Floating zones. Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (N.Y. 1951).

    c. Flexible selective zoning. Eves v. Zoning Board of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960).

    d. Contract zoning. Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680 (N.Y. 1960).

    e. Cluster zoning. Chrinko v. South Brunswick Township Planning Board, 77 N.J. Super. 594, 187 A.2d 221 (N.J. Super. 1963), Hiscox v. Levine, 31 Misc.2d 151, 216 N.Y.S.2d 801 (N.Y. Sup.Ct. 1961).

    f. Planned unit development. Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (Pa. 1968), Bigenho v. Montgomery County Council, 248 Md. 386, 237 A.2d 53 (1968).

    g. Height zoning. Welch v. Swasey, 214 U.S. 91 (1909).

    h. Bulk zoning. Broadway, Laguna, Vallejo Ass'n. v. Board of Permit Appeals, 66 Cal.2d 767, 427 P.2d 810, 59 Cal. Rptr. 146 (1967).

    i. Floodplain zoning. Dooley v. Town Plan & Zoning Commission of Town of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964), Vartelas v. Water Resources Commission, 146 Conn. 650, 153 A.2d 822 (1959), McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953).

j. Performance zoning. Gillespie, *Industrial Zoning and Beyond: Compatibility Through Performance Standards*, 46 J. Urban L. 723 (1968).

k. Transition or buffer zoning. *Evanston Best & Co. v. Goodman*, 369 Ill. 207, 16 N.E.2d 131 (1938).

l. Interim zoning. *First Nat. Bank v. The County of Cook*, 27 Ill.2d 586, 190 N.E.2d 294 (1963).

3. Spot Zoning

Was the rezoning solely for the benefit of the affected property or was it in furtherance of the zoning plan? *Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 (1961).

D. Planned Unit Development

1. The Planned Unit Development Act of 1972. 1973 C.R.S. 24-67-101, *et seq*.

2. What is a PUD?

". . . an area of land, controlled by one or more landowners, to be developed under unified control or unified plan of development for a number of dwelling units, commercial, educational, recreational, or industrial uses, or any combination of the foregoing, the plan for which does not correspond in lot size, bulk, or type of use, density, lot coverage, open space, or other restriction to the existing land use regulations." 1973 C.R.S. 24-67-103(3).

3. Judicial remarks in *Dillon Companies, Inc., v. City of Boulder*, ____ Colo. ____, 515 P.2d 627, 629 (1973):

". . . we note that many planned development ordinances represent a modern concept in progressive municipal planning. Usually, such ordinances, in effect, provide for the rezoning of a relatively small area within a large zoned area. Such rezoning may be approved but only if a number of specified conditions exist, if certain procedures are followed, and if various standards are met. Even though rezoning is involved, the concept is novel to traditional zoning or rezoning."

E. H.B. 1041 (1974) (§24-65.1-101, *et seq.*, C.R.S. 1973)

1. Provides for the Regulation of Matters of State Interest

   a. "Activities of State Interest"

      (1) Site selection and construction of major new domestic water and sewage treatment systems
      (2) Major extensions of existing domestic water and sewage treatment systems
      (3) Site selection and development of solid waste disposal sites
      (4) Site selection of airports
      (5) Site selection of rapid or mass transit facilities
      (6) Site selection of arterial highways and interchanges and collector highways
      (7) Site selection and construction of major facilities of a public utility
      (8) Site selection and development of new communities
      (9) Efficient utilization of municipal and industrial water projects
      (10) Conduct of nuclear detonations

   b. Development in "Areas of State Interest"

      (1) Mineral resource areas
      (2) Geologic hazard areas
      (3) Wildfire hazard areas
      (4) Flood hazard areas
      (5) Historical and archeological resource areas
      (6) Significant wildlife habitats
      (7) Shorelands of major publicly-owned reservoirs
      (8) Areas around airports
      (9) Areas around major facilities of a public utility
      (10) Areas around interchanges involving arterial highways
      (11) Areas around rapid or mass transit facilities

2. Local Control

   a. Local governments regulate, by issuance of permits, "matters of state interest" after the localities themselves designate those matters and issue guidelines and regulations for their administration. 1973 Colo. S.L., pp. 335, _et seq._, adding 1973 C.R.S. 24-65.1-101, _et seq._

b. L.U.C. may formally request local governments to begin designation proceedings. 1974 Colo. S.L., p. 349, adding 1973 C.R.S. 24-32-407.

3. _L.U.C. Guidelines for Designation_

The Land Use Commission has approved its own guidelines for _designation_, as well as those which have been prepared by various state agencies, some of which have developed model regulations for use by local governments. 1974 Colo. S.L., p. 347, adding 1963 C.R.S. 106-7-401(1)(b); Colorado Land Use Commission, _Local Government Progress Under House Bill 1041, Report to the Colorado General Assembly_, January, 1975, Appendix N.

a. _The LUC's Own Guidelines_:

Colorado Land Use Commission, _Guidelines for Identification and Designation_, 9/19/75.

b. _Other Agency Guidelines_

(* indicates approved by L.U.C. as of 9/19/75)

Mineral Resource Areas

*Special Publication No. 6 entitled, "Guidelines and Criteria for Identification and Land Use Controls of Geological Hazard and Mineral Resource Areas," prepared by Colorado Geological Survey, 1974

Geological Hazard Areas

*Special Publication No. 6 entitled, "Guidelines and Criteria for Identification and Land Use Controls of Geological Hazard and Mineral Resource Areas," prepared by Colorado Geological Survey, 1974

Wildfire Hazard Areas

*"Guidelines and Criteria for Wildfire Hazard Areas," prepared by Colorado State Forest Service, Colorado State University, Ft. Collins, Colorado, September, 1974

Flood Hazard Areas

*"Criteria and Procedures for Flood Hazard Identification," prepared by Colorado Water Conservation Board, August 29, 1974

"Recommended Guidelines for Assistance to Local Governments in Identification of Matters of State Interest," prepared by Colorado Soil Conservation Board, October 25, 1974

Historical and Archeological Resource Areas

*"Guidelines - History and Archaeology," prepared by State Historical Society of Colorado, August, 1974

Significant Wildlife Areas, Habitats, Shorelands at Major Publicly Owned Reservoirs

*"Guidelines for Identification, Designation, and Administration of Significant Wildlife Habitats and Shorelands of Major Publicly Owned Reservoirs," prepared by the Colorado Department of Natural Resources, Division of Wildlife, Edited by Robert Hoover, October, 1974

Areas Around Airports

"Airports Guidelines," prepared by Division of Planning & Isbill Associates, Inc., Denver, April, 1975

Areas Around Interchanges Involving Arterial Highways

"Action Plan - Guidelines for Local Governments Decision Making Relating to Highway Matters of State Interest," prepared by Colorado Division of Highways, October, 1974

Areas Around Major Facilities of a Public Utility

None available

Areas Around Rapid or Mass Transit Facilities

None available

Resource Data Inventories, Soils, Soil Suitability, Erosion and Sedimentation, Floodwater Problems, and Watershed Protection

"Recommended Guidelines for Assistance to Local Governments in Identification of Matters of State Interest," prepared by Colorado Soil Conservation Board, October 25, 1974

Site Selection and Construction of Major New Domestic Water and Sewage Treatment Systems

None prepared, draft in progress by L.U.C. staff

Major Extensions of Existing Domestic Water and Sewage Treatment Systems

None prepared, draft in progress by L.U.C. staff

Site Selection and Development of Solid Waste and Disposal Sites

Draft in progress by L.U.C. staff

Site Selection of Airports

See "Areas of State Interest - Areas Around Airports"

Site Selection of Rapid or Mass Transit Facilities

*"Guidelines for Administration of Rapid or Mass Transit," prepared by L.U.C. staff, October, 1974

Site Selection of Arterial Highways and Interchanges and Collector Highways

*Excerpts prepared from Division of Highways "Action Plan"

Site Selection and Construction of Major Facilities of a Public Utility

None prepared

Site Selection and Development of New Communities

*"New Community Guidelines," prepared by L.U.C. staff, October 25, 1974, amended December 2, 1974

Efficient Utilization of Municipal and Industrial Water Projects

None prepared

Conduct of Nuclear Detonations

None prepared

4. Statutory Criteria for Administration

a. Development in areas of state interest. 1974 Colo. S.L., pp. 341-42, adding 1973 C.R.S. 24-65.1-202(1).

b. Activities of state interest. 1974 Colo. S.L., p. 344, adding 1973 C.R.S. 24-65.1-204(1).

5. Model Regulations for Local Governments Promulgated by the Land Use Commission

	Title	Date Approved
a.	Administrative Regulations	12/11/75
b.	Mineral Resource Areas	5/28/76
c.	Geologic Hazard Areas	3/26/76
d.	Wildfire Hazard Areas	3/26/76
e.	Flood Hazard Areas	5/27/76
f.	Historical and Archeological Resource Areas	5/27/76
g.	Significant Wildlife Habitat Areas	3/26/76
h.	Shorelands of Major Publicly Owned Reservoirs	2/27/76
i.	Areas Around Airports	2/11/75
j.	Areas Around Major Facilities of a Public Utility	6/25/76
k.	Areas Around Interchanges Involving Arterial Highways	2/27/76
l.	Areas Around Rapid or Mass Transit Facilities	7/23/76
m.	Site Selection and Construction of Major New Domestic Water and Sewage Treatment Systems	6/25/76
n.	Site Selection and Development of Solid Waste Disposal Sites	1/22/76
o.	Site Selection of Airports	12/11/75
p.	Site Selection of Rapid or Mass Transit Facilities	7/23/76
q.	Site Selection of Arterial Highways and Interchanges and Collector Highways	5/27/76
r.	Site Selection and Construction of Major Facilities of a Public Utility	6/25/76
s.	Site Selection and Development of New Communities	5/27/76
t.	Efficient Utilitzation of Municipal and Industrial Water Projects	5/28/76
u.	Conduct of Nuclear Detonations	3/26/76

6. Actual Local Designations as of 8/17/76

Gunnison County

Site Selection of Airports

Pueblo County

Site Selection of Highways, New Communities, Water and Sewer Systems, Mineral Resource Areas, Natural Hazard Areas

Boulder County

Site Selection of New Communities

Phillips County

Conduct of Nuclear Detonations, Areas Around Holyoke and Haxtun Airports

Pitkin County

All 21 Matters of State Interest except: Mineral Resource Areas, Areas Around Major Facilities of Public Utilities, Soils as a Geologic Hazard, Independence Pass Tunnel as a Historic Site, and Highway Interchange Areas

Lincoln County

Site Selection and Construction of Major Facilities of Public Utilities

Mesa County

Area Around Walker Field (Airport)

Louisville

Geologic Hazard Areas (For Colorado Technological Center area only)

Bent County

Mineral Resource Areas; Geologic, Flood, and Wildfire Hazard Areas

Huerfano County

Mineral Resource Areas; Geologic, Flood, and Wildfire Hazard Areas

Montezuma County

Mineral Resource Areas, Geologic Hazard Areas

Dolores County

Mineral Resource Areas, Geologic Hazard Areas

Yuma County

Flood Hazard Areas, Site Selection and Construction of Major Facilities of Public Utilities, Conduct of Nuclear Detonations

Clear Creek County

Geologic and Flood Hazard Areas

La Plata County

Mineral Resource Areas; Geologic, Flood, and Wildfire Hazard Areas

Note: All counties, except those noted below, have adopted local regulations to control development in mineral resource areas, geologic hazard areas, flood hazard areas, and wildfire hazard areas. These regulations conform to the guidelines for administration of those matters of state interest as specified in H.B. 1041 but generally use the authority of zoning and subdivision statutes or H.B. 1034. Those counties that have not adopted minimum regulations are: Delta, Garfield, Moffat, Montrose, Hinsdale, Douglas, Arapahoe.

F. H.B. 1034

1. Title

The Local Government Land Use Control Enabling Act. 1974 Colo. S.L., pp. 353, *et seq*., adding 1963 C.R.S. 106-8-101, *et seq*., prospectively 1973 C.R.S. 29-20-101, *et seq*.

2. Specific Powers 1974 Colo. S.L., pp. 353-354, adding 1963 C.R.S. 106-8-104(1)(a)-(g), prospectively 1973 C.R.S. 29-20-104(1)(a)-(g), emphasis added.

--"Regulating development and activities in hazardous areas;

--"Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and where an activity would endanger a wildlife species;

--"Preserving areas of historical and archaeological importance;"

--Regulating the establishment of certain roads on public lands;

--"Regulating the location of activities and developments which may result in significant changes in population density;

--"Providing for phased development of services and facilities;

--"Regulating the use of land on the basis of the impact thereof on the community or surrounding areas."

3. The "Otherwise" Power

"Otherwise planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights." 1974 Colo. S.L., p. 354, adding 1963 C.R.S. 106-8-104(1)(h), prospectively 1973 C.R.S. 29-20-104(1)(h).

G. Local Regulation of Environmental Quality

1. County and District Health Departments

   a. Water quality, enforce state law. 1973 C.R.S. 25-1-506(1)(a).

   b. Air quality, cooperate with state. 1973 C.R.S. 25-1-506(k).

2. Regional Health Departments

   a. Water quality, enforce state law. 1973 C.R.S. 25-1-708(1)(a).

   b. Air quality, cooperate with state. 1973 C.R.S. 25-1-708(1)(g).

3. Local Air Pollution Control Regulations

   Local governments may enact air pollution controls. 1973 C.R.S. 25-7-125(1).

   a. Must provide for variances, hearings, judicial review, and injunctions. 1973 C.R.S. 25-7-125(1).

   b. Emission control regulations must be at least as restrictive as state regulations. 1973 C.R.S. 25-7-125(1).

H. Individual Sewage Disposal Systems

1. Background

   The Individual Sewage Disposal Systems Act of 1973. 1973 C.R.S. 25-10-101.

2. Minimum Standards

   a. Department of Health Guidelines

      Establish a basis for local rules and regulations. Regulations for Individual Sewage Disposal Systems, Colorado Department of Health, adopted September 19, 1973, effective March, 1974, as amended.

   b. Statute

      Prescribes standards for installation and maintenance of individual disposal systems as well as for the administration of the regulatory system. 1973 C.R.S. 25-10-105(1).

3. Permits for Installation

Issued by local boards of health, 1973 C.R.S. 25-10-105(1)(f), and required for affiliated construction. 1973 C.R.S. 25-10-111(1).

4. Licenses

Issued by local boards of health for licensing of systems contractors and systems cleaners. 1973 C.R.S. 25-10-108(1), 1973 C.R.S. 25-10-108(2).

5. Identified Areas

If local regulations are inadequate, the Water Quality Control Commission may identify the geographical area and impose its own regulations for individual sewage disposal systems. 1973 C.R.S. 25-18-206.

I. Federal Telecommunications Research Facilities

The Telecommunications Research Facilities of the United States Act of 1969 requires that local zoning and subdivision regulations safeguard federal telecommunications research facilities from electrical interference. 1973 C.R.S. 30-11-601, et seq.

J. Preservation of Commercial Mineral Deposits

"'Commercial mineral deposit' means a natural mineral deposit of limestone used for construction purposes, coal, sand, gravel, and quarry aggregate, for which extraction by an extractor is or will be commercially feasible and regarding which it can be demonstrated by geologic, mineralogic, or other scientific data that such deposit has significant economic or strategic value to the area, state, or nation." 1973 C.R.S. 34-1-302(1).

"'Populous county or populous counties of the state' means any county or city and county having a population of sixty-five thousand inhabitants or more according to the latest federal decennial census." 1973 C.R.S. 34-1-302(3).

1. Colorado Geological Survey 1973 C.R.S. 34-1-103.

"After July 1, 1973, the Colorado geological survey shall contract for a study of the commercial mineral deposits in the populous counties of the state in order to identify and locate such deposits. Such study shall be of sand, gravel, and quarry aggregate, and shall be completed on or before July 1, 1974, and shall include a map or maps of the state showing such commercial mineral deposits, copies of which may be generally circulated. Any commercial mineral deposits discovered subsequent to July 1, 1974, may be, upon discovery, included in such study."

2. Local Master Plans for Extraction 1973 C.R.S. 34-1-304. (emphasis added)

"The county planning commission for unincorporated areas and for cities and towns having no planning commission *or* the planning commission for each city *and* county, city, or town, within each populous county of the state, shall, with the aid of the maps from the study conducted pursuant to section 34-1-303, conduct a study of the commercial mineral deposits located within its jurisdiction and develop a master plan for the extraction of such deposits, which plan shall consist of text and maps. In developing the master plan, the planning commission shall consider, among others, the following factors:

--"Any system adopted by the Colorado geological survey grading commercial mineral deposits according to such factors as magnitude of the deposit and time of availability for and feasibility of extraction of a deposit;

--"The potential for effective multiple-sequential use which would result in the optimum benefit to the landowner, neighboring residents, and the community as a whole;

--"The development or preservation of land to enhance development of physically attractive surrounding compatible with the surrounding area;

--"The quality of life of the residents in and around areas which contain commercial mineral deposits;

--"Other master plans of the county, city and county, city, or town;

--"Maximization of extraction of commercial mineral deposits; and

--"The ability to reclaim an area pursuant to the provisions of article 32 of this title.

"A planning commission shall cooperate with the planning commissions of contiguous areas and the land reclamation board created by section 34-32-105 in conducting the study and developing the master plan for extraction.

"A county planning commission shall certify its master plan for extraction to the board of county commissioners or the governing body of the city or town where the county planning commission is acting in lieu of a city or town planning commission. A planning commission in any city and county, city, or town shall certify its master plan for extraction to the governing body of such city and county, city, or town.

"After receiving the certification of such master plan and before adoption of such plan, the board of county commissioners or governing body of a city and county, city, or town, shall hold a public hearing thereon, and at least thirty days' notice of the time and place of such hearing shall be given by one publication in a newspaper of general circulation in the county, city and county, city, or town. Such notice shall state the place at which the text and maps so certified may be examined.

"The board of county commissioners or governing body of a city and county, city, or town may, after such public hearing, adopt the plan, revise the plan with the advice of the planning commission and adopt it, or return the plan to the planning commission for further study and rehearing before adoption, but, in any case, a master plan for extraction of commercial mineral deposits shall be adopted for the unincorporated territory and any city and county, city, or town in each populous county of the state on or before July 1, 1975."

3. Prohibition of Local Interference with Deposits 1973 C.R.S. 34-1-305

"After July 1, 1973, no board of county commissioners, governing body of any city and county, city, or town, or other governmental authority which has control over zoning shall, by zoning, rezoning, granting a variance, or other official action or inaction, permit the use of any area known to contain a commercial mineral deposit in a manner which would interfere with the present or future extraction of such deposit by an extractor.

"After adoption of a master plan for extraction for an area under its jurisdiction, no board of county commissioners, governing body of any city and county, city, or town, or other governmental authority which has control over zoning shall, by zoning, rezoning, granting a variance, or other official action or inaction, permit the use of any area containing a commercial mineral deposit in a manner which would interfere with the present or future extraction of such deposit by an extractor.

"Nothing in this section shall be construed to prohibit a board of county commissioners, a governing body of any city and county, city, or town, or any other governmental authority which has control over zoning from zoning or rezoning land to permit a certain use, if said use does not permit erection of permanent structures upon, or otherwise permanently preclude the extraction of commercial mineral deposits by an extractor from, land subject to said use.

"Nothing in this section shall be construed to prohibit a board of county commissioners, a governing body of any city and county, city, or town, or other governmental authority which has control over zoning from zoning for agricultural use, only, land not otherwise zoned on July 1, 1973.

"Nothing in this section shall be construed to prohibit a use of zoned land permissible under the zoning governing such land on July 1, 1973."

K. Underground Conversion of Utilities

Local governing bodies may create a local improvement district and assess the land within the district to pay for the conversion of overhead electrical or communications facilities to underground locations. 1973 C.R.S. 29-8-101, *et seq*.

IV. COUNTY LAND USE CONTROLS

A. The County Planning Commission

1. Required after July 1, 1971. 1973 C.R.S. 30-28-102(1).

2. Appointed by county commissioners. 1973 C.R.S. 30-28-102(1).

3. May employ staff. 1973 C.R.S. 30-28-104(1).

4. General powers include:

   a. Preparation and adoption of county master plan.

   b. Preparation and recommendations to the county commissioners of the county's:

      (1) Zoning plan
      (2) Subdivision regulations
      (3) Building code

B. The County Master Plan

1. General Purpose of the Master Plan

   a. Guides physical development of the county's unincorporated areas, in a "coordinated, adjusted, and harmonious" manner. 1973 C.R.S. 30-28-107.

   b. Takes the form of text, plats, and charts containing the recommendations for future county development: location of important public facilities and improvements, 1973 C.R.S. 30-28-106(3)(a), and for extraction of commercial mineral deposits in populous counties. 1973 C.R.S. 34-4-304.

2. Procedural Steps in County Master Plan Adoption

   a. Submitted to Division of Planning for advice and recommendations. 1973 C.R.S. 30-28-122.

   b. County planning commission may adopt the plan, in whole or in part, by resolution. 1973 C.R.S. 30-28-108.

   c. Planning commission certifies the plan to the county commissioners. 1973 C.R.S. 30-28-109

3. Effect of the Master Plan Itself

a. Planning Commission Approval Required

After adoption, no road, park, public way, ground or space, public building or structure, or public utility may be constructed or authorized unless the proposed location has been submitted to and approved by the county planning commission. 1973 C.R.S. 30-28-110(1)(a).

b. Reversal of Planning Commission

If the planning commission should disapprove the project, it may be overruled by the county commissioners or other submitting public official or board. 1973 C.R.S. 30-28-110(1)(b), (c).

C. County Zoning

1. The Zoning Plan

a. Zoning plan includes the zoning resolution and zoning map(s). 1973 C.R.S. 30-28-111(1).

b. Regulates, by districts or zones: 1973 C.R.S. 30-28-111(1)

(1) Structures: location, height, bulk and size.
(2) Lots: size and percentage occupied.
(3) Population: distribution and density.
(4) Use of buildings and land for trade, industry, residence, recreation, public activities and all purposes.
(5) Land use based on flood hazard.

2. Creation and Adoption of the Zoning Plan

a. Planning commission prepares a proposed zoning plan. 1973 C.R.S. 30-28-111(1).

b. In the interim, the county commissioners may adopt temporary zoning. 1973 C.R.S. 30-28-121.

c. The proposed zoning plan is then submitted by the planning commission to the Division of Planning for advice and recommendations. 1973 C.R.S. 30-28-122.

d. The planning commission may then certify the proposed zoning plan to the county commissioners. 1973 C.R.S. 30-28-112.

e. The county commissioners must then hold a public hearing, after proper notice, on the merits of the proposed zoning plan. 1973 C.R.S. 30-28-112.

f. After the hearing, the county commissioners may not make "substantial changes" in the zoning plan without resubmission to the planning commission for its recommendations. 1973 C.R.S. 30-28-112.

g. The county commissioners may then adopt the zoning plan by resolution. 1973 C.R.S. 30-28-113(1).

h. The zoning resolution must then be filed with the county clerk and recorder who shall index its contents "as nearly as possible in the same manner as he indexes instruments pertaining to the title of land." 1973 C.R.S. 30-28-125.

3. Districting

Districting has been held to be a purely legislative function, vesting broad latitude in drawing district boundary lines and establishing uses therein. Board of County Commissioners of Boulder County v. Thompson, 177 Colo. 277, 493 P.2d 1358 (1972).

4. Bases of Attack on Zoning

a. Bears no substantial relation to police power objectives. Ford Leasing Development Co. v. Board of County Commissioners of Jefferson County, ___ Colo. ___, 528 P.2d 237 (1974).

b. Being applied in a discriminatory manner. Roeder v. Miller, 159 Colo. 436, 412 P.2d 219 (1966).

c. Precludes the use of the zoned land for any reasonable purpose. Famularo v. Board of County Commissioners, ___ Colo. ___, 505 P.2d 958 (1973).

5. Amendment of the Zoning Resolution

a. Upon application of county or landowner. 1973 C.R.S. 30-28-116.

b. Requires a showing that conditions have so changed that an amendment is required to enhance the public health, safety, convenience, or welfare. Board of County Commissioners of Jefferson County v. Simmons, 177 Colo. 397, 494 P.2d 85 (1972).

c. Procedure is mandated by statute. Orth v. Board of County Commissioners of Boulder County, 158 Colo. 540, 408 P.2d 974 (1966).

6. Enforcement of Zoning

   a. Building permit system. 1973 C.R.S. 30-28-113(1).

   b. Prosecution for commission of a misdemeanor at $100 and ten days for each day of violation. 1973 C.R.S. 30-28-124.

   c. Action for injunction, mandamus, abatement, etc. 1973 C.R.S. 30-28-124.

7. The County Board of Adjustment

   a. Required if county has zoning ordinance. 1973 C.R.S. 30-28-117(1).

   b. Appointed by county commissioners. 1973 C.R.S. 30-28-117(1).

   c. Powers:

      (1) Hears appeals concerning administration of the zoning resolution. 1973 C.R.S. 30-28-118(1), (2)(a).

      (2) Hears requests for variances from the zoning resolution. 1973 C.R.S. 30-28-118(2)(c).

      (3) Hears requests for special exceptions, 1973 C.R.S. 30-28-118(2)(b), if the power is delegated by the county commissioners. 1973 C.R.S. 30-28-118 (2)(b).

   d. Acts in an administrative or quasi-judicial role. East Side Baptist Church, Inc., v. Klein, 175 Colo. 168, 47 P.2d 549 (1971).

D. County Subdivision Regulations

1. Background

In response to S.B. 35, 1972, each county was required to adopt and enforce subdivision regulations for the unincorporated portions of the county. 1973 C.R.S. 30-28-133(1).

2. "Subdivision" or "Subdivided land"

The key aspect of subdivision regulations is the definition of "subdivision" or "subdivided land." 1973 C.R.S. 30-28-101(10)(a).

--"any parcel of land in the state, including land to be used for condominiums, apartments, or

--"any other multiple dwelling units unless such land when previously subdivided was accompanied by a filing which complied with the provisions of this article with substantially the same density, or

--"which is divided into two or more parcels, separate interests, or interests in common, unless exempted [by statute or by the county]." (emphasis added)

3. Exemptions from the Definition

a. Statutory

Unless adopted for the purpose of evading the subdivision regulations, subdivided land is not created by: 1973 C.R.S. 30-28-101(11)

--a method of disposition creating parcels of thirty-five (35) acres or more, unless intended for use by multiple owners,

--parcels created by order of court or operation of law,

--parcels created by operation of a lien, or other security instrument,

--parcels created by an investment trust,

--parcels creating cemetery lots,

--parcels creating an interest in oil, gas, minerals, or water separate from surface rights,

--parcels acquired by a husband and wife in joint tenancy, or

--parcels created by combination of parcels into larger parcels.

b. By the County Commissioners

"The board of county commissioners may, pursuant to rules and regulations or resolution, exempt . . . any division of land if . . . such division is not within the purposes of [1973 C.R.S. §§30-28-101, *et seq.*]." 1973 C.R.S. 38-28-101(10)(d).

4. Adoption of Subdivision Regulations

a. Planning commissions are to develop recommended subdivision regulations and submit them to the county commissioners. 1973 C.R.S. 30-28-133.

b. The county commissioners must conduct a public hearing, after notice, on the subdivision regulations. 1973 C.R.S. 30-28-133(1), (2).

c. The county commissioners may then adopt the subdivision regulations by resolution. 1973 C.R.S. 30-28-133(1).

d. After adoption of the subdivision regulations, they must be:

(1) Certified by the county commissioners and filed with the clerk and recorder. 1973 C.R.S. 30-28-133(2).

(2) Transmitted to and approved by the Land Use Commission. 1973 C.R.S. 30-28-133(1), (8).

5. Contents of Subdivision Regulations

a. Minimum Material to be Submitted
1973 C.R.S. 30-28-133(3)

--"Subdivision regulations adopted by a board of county commissioners pursuant to this section shall require subdividers to submit to the board of county commissioners data, surveys, analyses, studies, plans, and designs, in the form prescribed by the board of county commissioners, of the following items:

- --"Property survey and ownership;
- --"Relevant site characteristics and analyses applicable to the proposed subdivision including the following, which shall be submitted by the subdivider with the sketch plan:
    - --"Reports concerning streams, lakes, topography, and vegetation;
    - --"Reports concerning geologic characteristics of the area significantly affecting the land use and determining the impact of such characteristics on the proposed subdivision;
    - --"In areas of potential radiation hazard to the proposed future land use, evaluations of these potential radiation hazards;
    - --"Maps and tables concerning suitability of types of soil in the proposed subdivision, in accordance with the national cooperative soil survey;
- --"A plat and other documentation showing the layout or plan of development, including, where applicable, the following information:
    - --"Total development area;
    - --"Total number of proposed dwelling units;
    - --"Total number of square feet of proposed nonresidential floor space;
    - --"Total number of proposed off-street parking spaces, excluding those associated with single-family residential development;

--"Estimated total number of gallons per day of water system requirements where a distribution system is proposed;

--"Estimated total number of gallons per day of sewage to be treated where a central sewage treatment facility is proposed or sewage disposal means and suitability where no central sewage treatment facility is proposed;

--"Estimated construction cost and proposed method of financing of the streets and related facilities, water distribution system, sewage collection system, storm drainage facilities, and such other utilities as may be required of the developer by the county;

--"Maps and plans for facilities to prevent storm waters in excess of historic runoff, caused by the proposed subdivision, from entering, damaging, or being carried by conduits, water supply ditches and appurtenant structures, and other storm drainage facilities;

--"Adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed. Such evidence may include, but shall not be limited to:

--"Evidence of ownership or right of acquisition of or use of existing and proposed water rights;

--"Historic use and estimated yield of claimed water rights;

--"Amenability of existing rights to a change in use;

--"Evidence that public or private water owners can and will supply water to the proposed subdivision stating the amount of water available for use within the subdivision and the feasibility of extending service to that area;

--"Evidence concerning the potability of the proposed water supply for the subdivision."

b. Minimum Standards and Technical Procedures
1973 C.R.S. 30-28-133(4)

--"Subdivision regulations adopted by the board of county commissioners pursuant to this section shall also include, as a minimum, provisions governing the following matters:

--"Sites and land areas for schools and parks when such are reasonably necessary to serve the proposed subdivision and the future residents thereof. Such provisions may include:

--"Reservation of such sites and land areas, for acquisition by the county;

--"Dedication of such sites and land areas to the county or the public or, in lieu thereof, payment of a sum of money not exceeding the full market value of such sites and land areas. Any such sums, when required, shall be held by the board of county commissioners for the acquisition of said sites and land areas.

--"Dedication of such sites and land areas for the use and benefit of the owners and future owners in the proposed subdivision.

--"Standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways, which may require, in the opinion of the board of county commissioners, detention facilities which may be dedicated to the county or the public, as are deemed necessary to control, as nearly as possible, storm waters generated exclusively within a subdivision from a one hundred year storm which are in excess of the historic runoff volume of storm water from the same land area in its undeveloped and unimproved condition;

--"Standards and technical procedures applicable to sanitary sewer plans and designs, including soil percolation testing and required percolation rates and site design standards for on-lot sewage disposal systems when applicable;

--"Standards and technical procedures applicable to water systems."

6. Procedure for Submission

a. No Statutory Procedure

Although S.B. 35 does not itself establish a procedure for obtaining subdivision plat approval, the Land Use Commission promulgated model resolution regulations pursuant to 1973 C.R.S. 24-65-105.

b. The LUC Procedures

The model regulations, as well as the LUC's A Handbook on Senate Bill 35, break down the procedure into three steps: a "sketch plan," a "preliminary plan" and a "final plat."

(1) "Sketch Plan" 1973 C.R.S. 30-28-101(8)

". . . a map of a proposed subdivision, drawn and submitted in accordance with the requirements of adopted regulations, to evaluate feasibility and design characteristics at an early stage of the planning."

(2) "Preliminary Plan" 1973 C.R.S. 30-28-101(6)

". . . the map of a proposed subdivision and specified supporting materials, drawn and submitted in accordance with requirements of adopted regulations, to permit the evaluation of the proposal prior to detailed engineering and design."

(3) Final "Plat" 1973 C.R.S. 30-28-101(5)

> ". . . a map and supporting materials of certain described land prepared in accordance with subdivision regulations as an instrument for recording of real estate interests with the county clerk and recorder."

7. Referral of Preliminary Plan

a. Submission to Land Use Commission 1973 C.R.S. 30-28-134(7)

"The board of county commissioners shall send a copy of the preliminary plan or final plat submission to the Colorado Land Use Commission upon receipt of such submission."

b. Agencies to which the Preliminary Plan is Referred for Review 1973 C.R.S. 30-28-136(1)

"Upon receipt of a complete, preliminary plan submission, the board of county commissioners or its authorized representative shall distribute copies of prints of the plan as follows:

--"To the appropriate school districts;

--"To each county or municipality within a two-mile radius of any portion of the proposed subdivision;

--"To any utility, local improvement and service district, or ditch company, when applicable;

--"To the Colorado state forest service, when applicable;

--"To the appropriate planning commission;

--"To the local soil conservation district board within the county for explicit review and recommendations regarding soil suitability, floodwater problems, and watershed protection. Such referral shall be made even though all or part of a proposed subdivision is not located within the boundaries of a conservation district.

--"When applicable, to the county, district, regional, or state department of health, for its review of the on-lot sewage disposal reports, for review of the adequacy of existing or proposed sewage treatment works to handle the estimated effluent, and for a report on the water quality of the proposed water supply to serve the subdivision. The department of health to which the plan is referred may require the subdivider to submit additional engineering or geological reports or data and to conduct a study of the economic feasibility of a sewage treatment works prior to making its recommendations. No plan shall receive the approval of the board of county commissioners unless the department of health to which the plan is referred has made a favorable recommendation regarding the proposed method of sewage disposal.

--"When applicable, to the state engineer for an opinion regarding material injury to decreed water rights, historic use of and estimated water yield to supply the proposed development, and conditions associated with said water supply evidence. The state engineer shall consider the cumulative effect of on-lot wells on water rights and existing wells.

--"To the Colorado geological survey for an evaluation of those geologic factors which would have a significant impact on the proposed use of the land."

c. Time for Review 1973 C.R.S. 38-28-136(2)

"The agencies named in this section shall make recommendations within twenty-four days after the mailing by the county or its authorized representative of such plans unless a necessary extension of not more than thirty days has been consented to by the subdivider and the board of county commissioners of the county in which the subdivision area is located. The failure of any agency to respond within twenty-four days or within the period of an extension shall, for the purpose of the hearing on the plan, be deemed an approval of such plan; except that, where such plan involves twenty or more dwelling units, a school district shall be required to submit within said time limit specific recommendations with respect to the adequacy of school sites and, effective September 1, 1973, the adequacy of school structures."

8. Conditions of Subdivision Plat Approval

a. All Material Must be Submitted

1973 C.R.S. 30-28-134(5)

"No subdivision shall be approved . . . until such data, surveys, analyses, studies, plans, and designs as may be required [by statute] or by the county planning commission or the board of county commissioners have been submitted . . ."

b. Must Meet Sound Planning and Engineering Requirements

1973 C.R.S. 30-28-134(5)

"No subdivision shall be approved until [all required materials] have been submitted, reviewed, and found to meet all sound planning and engineering requirements of the county contained in its subdivision regulations."

c. Must be Evidence of Suitable Water Supply, Sewage Disposal and Soils and Topographical Conditions

1973 C.R.S. 30-28-133(6)

"No board of county commissioners shall approve any preliminary plan or final plat for any subdivision located within the county unless the subdivider has provided the following materials as part of the preliminary plan or final plat subdivision submission:

--"Evidence to establish that definite provision has been made for a water supply that is sufficient in terms of quantity, dependability, and quality to provide an appropriate supply of water for the type of subdivision proposed;

--"Evidence to establish that, if a public sewage disposal system is proposed, provision has been made for such system and, if other methods of sewage disposal are proposed, evidence that such systems will comply with state and local laws and regulations which are in effect at the time of submission of the preliminary plan or final plat;

--"Evidence to show that all areas of the proposed subdivision which may involve soil or topographical conditions presenting hazards or requiring special precautions have been identified by the subdivider and that the proposed uses of these areas are compatible with such conditions."

d. Guarantee of Public Improvements 1973 C.R.S. 30-28-137(1)

"No final plat shall be recorded until the subdivider has submitted and the board of county commissioners has approved one or a combination of the following:

--"A subdivision improvements agreement agreeing to construct any required public improvements shown in the final plat documents, together with collateral which is sufficient, in the judgment of said board, to make reasonable provision for the completion of said improvements in accordance with design and time specifications; or

--"Other agreements or contracts setting forth the plan, method, and parties responsible for the construction of any required public improvements shown in the final plat documents which, in the judgment of said board, will make reasonable provision for completion of said improvements in accordance with design and time specifications."

9. Consequences of Plat Approval

a. No plat may be recorded without approval of the county commissioners. 1973 C.R.S. 30-28-110(3)(b).

b. Approval does not constitute acceptance of any proposed dedication. 1973 C.R.S. 30-28-110(3)(b).

c. Owners and purchasers of lots are presumed to have notice of plans, maps and reports affecting the property. 1973 C.R.S. 30-28-110(3)(b).

10. Enforcement

a. Criminal Prosecution 1973 C.R.S. 30-28-110(4)(a)

"Any subdivider, or agent of a subdivider, who transfers or sells or agrees to sell or offers to sell any subdivided land before a final plat for such subdivided land has been approved by the board of county commissioners and recorded or filed in the office of the county clerk and recorder is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars for each parcel or interest in subdivided land which is sold or offered for sale. All fines collected under this paragraph (a) shall be credited to the general fund of the county."

b. Injunctive Relief 1973 C.R.S. 30-28-110(4)(b)

"The board of county commissioners of the county in which the subdivided land is located has the power to bring an action to enjoin any subdivider from selling, agreeing to sell, or offering to sell subdivided land before a final plat for such subdivided land has been approved by the board of county commissioners."

c. Deeds Not Void. Board of County Commissioners of Pitkin County v. Friedl Pfiefer and Capital Improvement Corporation, ____ Colo. App. ____, 532 P.2d 51 (1974)

11. Subdivider Registration Requirements 1973 C.R.S. 12-61-402

E. County Building Codes 1973 C.R.S. 30-28-201

"Such a code shall provide for the regulation of the future construction or alteration of dwellings, buildings, and structures, together with plumbing and electrical installations therein or in connection therewith."

1. Creation, Adoption and Filing

    a. Prepared by county planning commission. 1973 C.R.S. 30-28-202(1).

    b. Certified to county commissioners. 1973 C.R.S. 30-28-202(1).

    c. County commissioners hold hearing after public notice. 1973 C.R.S. 30-28-202(1).

    d. Substantial changes must be resubmitted to planning commission. 1973 C.R.S. 30-28-202(1).

    e. Building code adopted by resolution of county commissioners. 1973 C.R.S. 30-28-202(2).

    f. Certified copies of the adopted building code must be filed in the county commissioners' office. 1973 C.R.S. 3-20-208.

    g. The county commissioners must file a notice with the county clerk setting forth the area within the county which is subject to the building code. 1973 C.R.S. 3-20-208.

2. Effect of County Building Code 1973 C.R.S. 30-28-205

"After the adoption of such building code, it shall be unlawful to erect, construct, reconstruct, alter, or remodel any structure, dwelling, or building in the designated area, except buildings or structures used for the sole purpose of providing shelter for agricultural implements, farm products, livestock, or poultry without first obtaining a building permit from such county building inspector. The county building inspector shall not issue any permit unless the plans for such proposed erection, construction, reconstruction, alteration, or remodeling fully conform to the regulations and restrictions in said building code."

3. Amendment of County Building Code 1973 C.R.S. 30-28-204

   a. By resolution of county commissioners.

   b. After public hearing for which notice is given.

   c. If the area affected is to be changed, the planning commission must be allowed to give its advisory opinion.

4. The Board of Review 1973 C.R.S. 30-28-206, 207

   a. Appointed at the discretion of county commissioners.

   b. If provided in the adopted building code, the board of review may:

      (1) Make special exceptions to the building code.
      (2) Formulate suggested amendments to the building code.
      (3) Adopt substantive rules based on the building code, after public hearing upon notice.
      (4) Hear appeals by those aggrieved by:

         (a) their inability to obtain a building permit,

         (b) the administration of the building code.

5. Enforcement of the County Building Code 1973 C.R.S. 30-28-209

   a. Criminal prosecution for misdemeanor at $100 and/or ten days, per day of violation.

   b. Actions for injunction, mandamus or abatement.

F. Solid Waste Disposal Sites and Facilities

"'Solid wastes disposal' means the collection, storage, treatment, utilization, processing, or final disposal of solid wastes." 1973 C.R.S. 30-20-101(9).

"'Solid wastes disposal site and facility' means the location and facility at which the deposit and final treatment of solid wastes occur." 1973 C.R.S. 30-20-101(8).

"'Solid wastes' means garbage, refuse, sludge of sewage disposal plants, and other discarded solid materials, including solid waste materials resulting from industrial, commercial, and community activities but does not include agricultural wastes." 1973 C.R.S. 30-20-101(6).

1. Certificate of Designation Required 1973 C.R.S. 30-20-102

   "Except as provided in subsection (2) of this section, it is unlawful for any person to operate a solid wastes disposal site and facility in the unincorporated portion of any county without first having obtained therefor a certificate of designation from the board of county commissioners of the county in which such site and facility is located.

   "Any site and facility for the disposal of mill tailings, metallurgical slag, mining wastes, junk automobiles or parts thereof, or suspended solids collected, treated, or disposed of within a sanitary sewer system in operation immediately prior to July 1, 1971, shall have until July 1, 1972, to comply with the provisions of this part 1 and the rules and regulations adopted by the department."

2. Obtaining Certificate

   a. Application and Department of Health Review 1973 C.R.S. 30-20-103

      "Any person desiring to operate a solid wastes disposal site and facility within the unincorporated portion of any county shall make application to the board of county commissioners of the county in which such site and facility is or is proposed to be located for a certificate of designation. Such application shall be accompanied by a fee of twenty-five dollars which shall not be refundable, and it shall set forth the location of the site and facility; the type of site and facility; the type of processing to be used, such as sanitary landfill, composting, or incineration; the hours of operation; the method of supervision; the rates to be charged, if any; and such other information as may be required by the board of county commissioners. The application shall also contain such engineering, geological, hydrological, and operational data as may be quired by the department of regulation. The application shall be referred to the department for review and for recommendation as to approval or disapproval, which shall be based upon criteria established by the state board of health, the water quality control commission, and the air pollution control commission."

b. Evaluation of Application 1973 C.R.S. 30-20-104(1), (2), (3)

"In considering an application for a certificate of designation, the board of county commissioners shall take into account:

--"The effect that the solid wastes disposal site and facility will have on the surrounding property, taking into consideration the types of processing to be used, surrounding property uses and values, and wind and climatic conditions;

--"The convenience and accessibility of the solid wastes disposal site and facility to potential users;

--"The ability of the applicant to comply with the health standards and operating procedures provided for in this part 1 and such rules and regulations as may be prescribed by the department;

--"Recommendations by local health departments.

"Except as provided in this part 1, designation of approved solid wastes disposal sites and facilities shall be discretionary with the board of county commissioners, subject to judicial review by the district court of appropriate jurisdiction.

"Prior to the issuance of a certificate of designation, the board of county commissioners shall require that the report which shall be submitted by the applicant under section 30-20-103 be reviewed and a recommendation as to approval or disapproval made by the department and shall be satisfied that the proposed solid wastes disposal site and facility conforms to the comprehensive county land use plan, if any."

c. Department of Health Rules and Regulations

(1) General Contents 1973 C.R.S. 30-20-109

"The department shall promulgate rules and regulations for the engineering design and operation of solid wastes disposal sites and facilities, which may include:

--"The establishment of engineering design criteria applicable, but not limited, to protection of surface and subsurface waters, suitable soil characteristics, distance from solid wastes generation centers, access routes, distance from water wells, disposal facility on-site traffic control patterns, insect and rodent control, methods of solid wastes compaction in the disposal fill, confinement of wind-blown debris, recycling operations, fire prevention, and final closure of the compacted fill;

--"The establishment of criteria for solid wastes disposal sites and facilities which will place into operation the engineering design for such disposal sites and facilities."

(2) Minimum Standards to be Included 1973 C.R.S. 30-20-110

"The rules and regulations promulgated by the department shall, subject to the provisions of section 30-20-106, contain the following minimum standards:

--"Such sites and facilities shall be located, operated, and maintained in a manner so as to control obnoxious odors and prevent rodent and insect breeding and infestation, and they shall be kept adequately covered during their use.

--"Such sites and facilities shall comply with the health laws, standards, rules, and regulations of the department, the water quality control commission, and all applicable zoning laws and ordinances.

--"No radioactive materials or materials contaminated by radioactive substances shall be disposed of in sites or facilities not specifically designated for that purpose.

--"A site and facility operated as a sanitary landfill shall provide means of finally disposing of solid wastes on land in a manner to minimize nuisance conditions such as odors, windblown debris, insects, rodents, and smoke; and shall provide compacted fill material; shall provide adequate cover with suitable material and surface drainage designed to prevent ponding and water and wind erosion and prevent water and air pollution; and, upon being filled, shall be left in a condition of orderliness and good esthetic appearance and capable of blending with the surrounding area. In the operation of such a site and facility, the solid wastes shall be distributed in the smallest area consistent with handling traffic to be unloaded; shall be placed in the most dense volume practicable using moisture and compaction or other method approved by the department; shall be fire, insect, and rodent resistant through the application of an adequate layer of inert material at regular intervals; and shall have a minimum of windblown debris which shall be collected regularly and placed into the fill.

--"Sites and facilities shall be adequately fenced so as to prevent waste material and debris from escaping therefrom, and material and debris shall not be allowed to accumulate along the fence line.

--"Solid wastes deposited at any site or facility shall not be burned, except that, in extreme emergencies resulting in the generation of large quantities of combustible materials, authorization for burning under controlled conditions may be given by the department."

d. Public Hearing on Application 1973 C.R.S. 30-20-104(3)

> "The application, report of the department, comprehensive land use plan, and other pertinent information shall be presented to the board of county commissioners at a public hearing to be held after notice. Such notice shall contain the time and place of the hearing and shall state that the matter to be considered is the applicant's proposal for a solid wastes disposal site and facility. The notice shall be published in a newspaper having general circulation in the county in which the proposed solid wastes disposal site and facility is located at least ten but no more than thirty days prior to the date of the hearing."

e. Issuance of Certificate 1973 C.R.S. 30-20-105

> "If the board of county commissioners deems that a certificate of designation should be granted to the applicant, it shall issue the certificate, and such certificate shall be displayed in a prominent place at the site and facility. The board of county commissioners shall not issue a certificate of designation if the department has recommended disapproval pursuant to section 30-20-103."

3. Enforcement

a. Violations are public nuisances which may be enjoined. 1973 C.R.S. 30-20-113.

b. Criminal prosecution for misdemeanor. 1973 C.R.S. 30-20-114.

c. No applicability to disposal of one's own solid waste on one's own property, so long as there is no public nuisance. 1973 C.R.S. 30-20-106.

G. Roadside Advertising

1. County may regulate along the county highway system. 1973 C.R.S. 43-2-139.

2. Regulation based on standards designed by State Highway Commission. 1973 C.R.S. 43-1-401.

H. Stream Flow and Flood Control 1974 Colo. S.L., p. 230, adding 1963 C.R.S. 36-31-102(1), prospectively 1973 C.R.S. 30-30-102(1).

I. County Housing Authorities 1973 C.R.S. 29-4-501, et seq.

J. Prevention of Soil Erosion

   1. The 1951 Soil Erosion Act. 1973 C.R.S. 35-71-101, et seq.

   2. The 1954 Soil Erosion Act. 1973 C.R.S. 35-72-101, et seq.

K. Special District Control Act 1973 C.R.S. 32-1-201, et seq.

V. MUNICIPAL LAND USE CONTROL

A. Home Rule v. Statutory Municipalities

1. Numbers

Of the 216 municipalities (195 towns and 21 cities) in Colorado, all but 39 are statutory municipalities.

2. Enabling Legislation v. Home Rule Charters

Colo. Const., Art. XX, §6.

a. In general, enabling legislation applies to both home-rule and statutory municipalities.

b. However, the charter of a home-rule municipality may supersede conflicting enabling legislation.

3. Home Rule Land Use Measures

a. The home rule charter vests the municipality with the powers generally held by the General Assembly for regulation of local and municipal matters. *Service Oil Co. v. Rhodus*, ____ Colo. ____, 500 P.2d 807 (1972), *Roosevelt v. City of Englewood*, 176 Colo. 576, 492 P.2d 65 (1972), *Lehman v. City and County of Denver*, 144 Colo. 109, 355 P.2d 309 (1960), *Laverty v. Straub*, 110 Colo. 311, 134 P.2d 208 (1943).

b. Such matters include the following:

(1) Zoning. *Roosevelt v. City of Englewood*, 176 Colo. 576, 492 P.2d 65 (1972).

(2) Issuance of bonds. Colo. Const., Art. XX, §6; *Davis v. City of Pueblo*, 158 Colo. 319, 406 P.2d 671 (1965).

(3) Consolidation of districts. Colo. Const., Art. XX, §6.

(4) Taxation. Colo. Const., Art. XX, §6.

(5) Collection of fines. Colo. Const., Art. XX, §6.

        (6) Construction. Colo. Const., Art XX, §1.

        (7) Eminent domain. Colo. Const., Art. XX, §1; Fischel v. City and County of Denver, 106 Colo. 576, 108 P.2d 236 (1940).

        (8) Building codes. Heron v. City and County of Denver, 131 Colo. 501, 283 P.2d 647 (1955).

B. The Municipal Planning Commission 1973 C.R.S. 31-23-202 (1975 Supp.)

1. Membership 1973 C.R.S. 31-23-203(1) (1975 Supp.)

    a. Statutory: 3-5, appointed and ex-officio.

    b. Home rule: unlimited.

2. General Attributes

    a. At least one meeting per month. 1973 C.R.S. 31-23-204 (1975 Supp.)

    b. Appoint staff and contract with others. 1973 C.R.S. 31-23-205 (1975 Supp.)

3. General Powers

    a. Make and adopt master plan. 1973 C.R.S. 31-23-206 (1975 Supp.)

    b. Recommend a zoning plan to be adopted by the legislative body. 1973 C.R.S. 31-23-306 (1975 Supp.)

    c. Make and adopt subdivision regulations. 1973 C.R.S. 31-23-214 (1975 Supp.)

    d. Approve subdivision plats. 1973 C.R.S. 31-23-215(1) (1975 Supp.)

C. The Municipal Master Plan

1. Purpose of the Municipal Master Plan 1973 C.R.S. 31-23-207 (1975 Supp.)

"The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs, which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development, including among other things, adequate provision for traffic, the promotion of safety from fire, flood waters, and other dangers, adequate provision for light and air, the promotion of healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements."

2. Content of the Municipal Master Plan 1973 C.R.S. 31-23-206(1) (1975 Supp.)

"Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall show the commission's recommendations for the development of [the municipality, including any areas outside of its boundaries, subject to the approval of the legislative or governing body having jurisdiction thereof, which in the commission's judgment, bear relation to the planning of such municipality] including, among other things:

--"The general location, character, and extent of streets, viaducts, subways, bridges, waterways, waterfronts, boulevards, parkways, playgrounds, squares, parks, aviation fields, and other public ways, grounds, and open spaces;

--"The general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power, and other purposes;

--"The removal, relocation, widening, narrowing, vacating, abandonment, change of use, or extension of any of the ways, grounds, open spaces, buildings, property, utility, or terminals referred to in paragraphs (a) and (b) of this subsection (1); and

--"A zoning plan for the control of the height, area, bulk, location, and use of buildings and premises."

3. Adoption of the Municipal Master Plan 1973 C.R.S. 31-23-208 (1975 Supp.)

a. Planning commission must hold public hearings, after notice.

b. Adopted by planning commission resolution carried by two-thirds vote.

c. If extraterritorial in effect:

   (1) Certified to governing body of affected territory.
   (2) Approved by that body.
   (3) Filed with appropriate county clerks and recorders.

4. Effect of Master Plan 1973 C.R.S. 31-23-209 (1975 Supp.)

"When the municipal planning commission has adopted the master plan of the municipality or of one or more major sections or districts thereof, no street, square, park or other public way, ground or open space, or public building or structure, or publicly or privately owned utility shall be constructed or authorized in the municipality or in such planned section and district until the location, character, and extent thereof has been submitted for approval by the commission. In case of disapproval, the commission shall communicate its reasons to the council, which has the power to overrule such disapproval by a recorded vote of not less than two-thirds of its entire membership. If the public way, ground space, building, structure, or utility is one the authorization or financing of which does not, under the law or charter provisions governing the same, fall within the province of the municipal council, then the submission to the planning commission shall be by the board, commission, or body having jurisdiction, and the planning commission's disapproval may be overruled by said board, commission, or body by a vote of not less than two-thirds of its membership. The failure of the commission to act within sixty days from and after the date of official submission to it shall be deemed approval."

5. Effect of Major Street Plan

Adoption of the "major street plan," (appearing to be a portion of the master plan, 1973 C.R.S. 31-23-206(1)(a) (1973 Supp.)), has several effects:

a. Allows control of subdivisions. 1973 C.R.S. 31-23-213 (1975 Supp.)

b. Controls the layout of city streets. 1973 C.R.S. 31-23-217(b) (1975 Supp.)

c. Controls the location of building construction. 1973 C.R.S. 31-23-218(1)(b) (1975 Supp.)

D. Municipal Zoning 1973 C.R.S. 31-23-301, *et seq.* (1975 Supp.)

1. Purpose 1973 C.R.S. 31-23-303 (1975 Supp.)

"Such regulations shall be made in accordance with a comprehensive plan [" master plan"?, *see* 1973 C.R.S. 31-23-106(1)(d)] and designed to lessen congestion in the streets; to secure safety from fire, panic, floodwaters, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land througout such municipality."

2. Contents 1973 C.R.S. 31-23-301 (1975 Supp.)

a. General

"Except as otherwise provided in section 34-1-305, C.R.S. 1973 [concerning preservation of commercial mineral deposits], for the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of each city and incorporated town is empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. Such regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained."

b. Flooding

"To the end that adequate safety may be secured, said legislative body also has power to establish, regulate, restrict, and limit such uses on or along any storm or floodwater runoff channel or basin, as such storm or floodwater runoff channel or basin has been designated and approved by the Colorado water conservation board, in order to lessen or avoid the hazards to persons and damage to property resulting from the accumulation of storm or floodwaters. Any ordinance . . . shall exempt from the operation thereof any building or structure as to which satisfactory proof is presented to the board of adjustment . . . that the present or proposed situation of such building or structure is reasonably necessary for the convenience or welfare of the public.

"The power conferred . . . for flood prevention and control shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is lawfully devoted on and after February 25, 1966, but provisions may be made for the gradual elimination of uses, buildings, and structures, including provisions for the elimination of such uses when the existing uses to which they are devoted are discontinued, and for the elimination of such buildings and structures when they are destroyed or damaged in major part.

"The legislative body of any city or incorporated town, or the board of adjustment thereof, in the exercise of powers pursuant to this section, may condition any zoning resultion, any amendment to such regulation, or any variance of the application thereof, or the exemption of any building or structure therefrom upon the preservation, improvement, or construction of any storm or floodwater runoff channel designated and approved by the Colorado water conservation board."

3. Districting 1973 C.R.S. 31-23-302 (1975 Supp.)

"For any of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this part 2; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts."

4. Adoption

a. Legislative body appoints a zoning commission which may be the planning commission. 1973 C.R.S. 31-23-306, 311 (1975 Supp.)

b. Commission recommends district boundaries and regulations therefor. 1973 C.R.S. 31-23-306 (1975 Supp.)

c. After receiving the commission's report, the legislative body conducts a public hearing after notice. 1973 C.R.S. 31-23-306, 304 (1975 Supp.)

d. The zoning is then adopted by the municipal legislative body. 1973 C.R.S. 31-23-304 (1975 Supp.)

5. Amendment 1973 C.R.S. 31-23-305 (1975 Supp.)

Following public hearing and notice requirements identical to those for adoption:

"Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such changes signed by the owners of twenty percent, or more, either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending one hundred feet therefrom, or of those directly opposite thereto, extending one hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the voting members of the legislative body of such municipality."

6. Conflict of Standards 1973 C.R.S. 31-23-310 (1975 Supp.)

When zoning conflicts with other land use controls, the provision with the more stringent control prevails.

7. Enforcement 1973 C.R.S. 31-23-308 (1975 Supp.)

a. General

> "In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained or any building, structure, or land is used in violation of [municipal zoning], the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises."

b. Building Permits: *Hoskinson v. City of Arvada*, 136 Colo. 450, 319 P.2d 1090 (1957) and *Flinn v. Treadwell*, 120 Colo. 117, 207 P.2d 962 (1949).

8. Board of Adjustment 1973 C.R.S. 31-23-307 (1975 Supp.)

a. Consists of five appointed members.

b. Is empowered to:

(1) Hear appeals from administration of zoning ordinance, with four votes required for reversal.

(2) Other matters to be referred to it under the zoning ordinance.

E. Municipal Subdivision Control

1. Jurisdiction: Municipal and Extra-Municipal 1973 C.R.S. 31-23-212 (1975 Supp.)

"The territory of jurisdiction of any municipal planning commission over the subdivision of land shall include all land located within the legal boundaries of the municipality and, limited only to control with reference to a major street plan and not otherwise, shall also include all land lying within three miles of the corporate limits of the municipality and not located in any other municipality, except that in the case of any such nonmunicipal land lying within five miles of more than one municipality, the jurisdiction of each municipal planning commission shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities. The jurisdiction over the subdivision of lands outside the boundary of a municipality shall apply equally in the case of charter home rule cities or noncharter home rule cities."

2. Adoption of Major Street Plan is a Condition Precedent 1973 C.R.S. 31-23-213 (1975 Supp.)

   "When a municipal planning commission has adopted a major street plan [a portion of the master plan? see 1973 C.R.S. 31-23-106(1)(a)] of the territory within its subdivision control or part thereof, as provided in section 31-23-108, and has filed a certified copy of such plan in the office of the county clerk and recorder of the county in which such territory or part is located, then no plat of a subdivision of land within such territory or part shall be filed or recorded until it has been approved by such planning commission and such approval entered in writing on the plat by the president, chairman, or secretary of the commission."

3. Adoption of Subdivision Regulations is a Condition Precedent 1973 C.R.S. 31-23-214 (1975 Supp.)

   "Before any municipal planning commission exercises the powers referred to in section 31-23-113 [resulting from adoption of the major street plan], said commission shall adopt regulations governing the subdivision of land within its jurisdiction and shall publish the same in pamphlet form, which shall be available for public distribution, or at the election of the commission, it may publish said regulations in one issue each week for three consecutive weeks in the official paper of the city or county in which such subdivisions or parts thereof are located."

   ***

   "Before the adoption of the regulations referred to in this section, a public hearing shall be held thereon in the county in which said territory or any part thereof is situated. A copy of such regulations shall be certified by the commission to the recorders of the counties in which the municipality and territory are located."

4. Contents of Subdivision Regulations 1973 C.R.S. 31-23-214(1) (1975 Supp.)

"Such regulations may provide for the proper arrangement of streets in relation to other existing or planned streets and to the master plan, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light and air, and for the avoidance of congestion of population, including minimum area and width of lots. In the territory subject to subdivision jurisdiction beyond the city limits, the regulations shall provide only for conformance with the major street plan."

5. Plat Approval Required 1973 C.R.S. 31-23-216 (1975 Supp.)

"Whoever, being the owner or agent of the owner of any land located within a subdivision, transfers or sells or agrees to sell or negotiates to sell any land by reference to or exhibition of or by use of a plat of a subdivision before such plat has been approved by the municipal planning commission and recorded or filed in the office of the appropriate county clerk and recorder shall forfeit and pay a penalty of one hundred dollars for each lot or parcel so transferred or sold or agreed or negotiated to be sold. The description of such lot or parcel by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties or from the remedies provided in this section. The municipal corporation may enjoin such transfer or sale or agreement by action for injunction brought in any court of equity jurisdiction or may recover the penalty by civil action in any court of competent jurisdiction."

6. Obtaining Plat Approval 1973 C.R.S. 31-23-215 (1975 Supp.)

"The municipal planning commission shall approve or disapprove a plat within thirty days after the submission thereof to it; otherwise such plat shall be deemed approved and a certificate to that effect shall be issued by the commission on demand. The applicant for the commission's approval may waive this requirement and consent to an extension of such period. The ground of disapproval of any plat shall be stated upon the records of the commission. Any plat submitted to the commission shall contain the name and address of a person to whom notice of a hearing shall be sent. No plat shall be acted on by the commission without affording a hearing thereon. Notice shall be sent to the address by registered mail of the time and place of such hearing not less than five days before the date fixed therefor. Similar notice shall be mailed to the owners of land immediately adjoining the platted land, as their names appear upon the plats in the county clerk and recorder's office and their addresses appear in the directory of the municipality or on the tax records of the municipality or county.

"Every plat approved by the commission, by virtue of such approval, shall be deemed to be an amendment of, or an addition to, or a detail of the municipal plan and a part thereof. Approval of a plat shall not be deemed to constitute or effect an acceptance by the public of any street or other open space shown upon the plat. From time to time, the planning commission may recommend to the council amendments of the zoning ordinance or map or additions thereto to conform to the commission's recommendations for the zoning regulations of the territory comprised within approved subdivisions. The commission has the power to agree with the applicant, upon the use, height, area, or bulk requirements or restrictions governing buildings and premises within the subdivision, if such requirements or restrictions do not authorize the violation of the then effective zoning ordinance of the municipality. Such requirements or restrictions shall be stated upon the plat prior to the approval and recording thereof and shall have the same force by law and be enforceable in the same manner and with the same sanctions and penalties and subject to the same powers of amendment or repeal as though set out as a part of the zoning ordinance or map of the municipality. No action taken under this section shall be binding for any purpose until the same has been approved by the legislative governing body of the territory affected or any part thereof."

F. Municipal Building Codes

1. The Building Inspector

Every municipality is authorized to appoint a building inspector and "to define his powers and duties." 1973 C.R.S. 31-15-301(1)(a), repealed and reenacted in general terms in 1973 C.R.S. 31-15-201(1)(b) (1975 Supp.)

2. Building Codes

a. In home-rule municipalities, building codes are local matters. Heron v. City and County of Denver, 131 Colo. 501, 283 P.2d 647 (1955).

b. Statutory municipalities have no express power to adopt a code but do have implied powers to do so. 1973 C.R.S. 31-15-601(1)(c), (d), (e) (1975 Supp.)

G. Housing and Urban Development

1. Urban Renewal Law. 1973 C.R.S. 31-25-101, *et seq*. (1975 Supp.)

2. City Housing Law. 1973 C.R.S. 29-4-101, *et seq*.

3. Housing Authorities Law. 1973 C.R.S. 29-4-201, *et seq*.

4. Rehabilitation Act of 1945. 1973 C.R.S. 29-4-301, *et seq*.

5. Veterans' Housing. 1973 C.R.S. 29-4-401, *et seq*.

H. City and Town Parks 1973 C.R.S. 31-25-201, *et seq*., 1973 C.R.S. 31-25-301, *et seq*. (1975 Supp.)

I. Pedestrian Malls 1973 C.R.S. 31-25-401, *et seq*. (1975 Supp.)

J. Major Activity Notice 1973 C.R.S. 31-23-225 (1975 Supp.)

"Whenever a subdivision or commercial or industrial activity is proposed which will cover five or more acres of land, the governing body of the municipality in which the activity is proposed shall send notice to the Colorado land use commission, the state geologist, and the board of county commissioners of the county in which the improvement is located of the proposal prior to approval of any zoning change, subdivision, or building permit application associated with such a proposed activity. Such notice shall be in a standard form, shall be promulgated as a rule and regulation prescribed by the land use commission, and shall contain such information as the land use commission prescribes."

K. Condemnation of Water Rights (H.B. 1555, 1975) §38-6-201, *et seq.*, C.R.S. 1973 (1975 Supp.)

1. Applicability (§38-6-201)

   ". . . to any water right which is to be condemned by a town, city, city and county, or municipal corporation having the powers of condemnation . . ."

2. Time Limitation; Prior Public Use (§38-6-202(2))

   "No municipality shall be allowed to condemn water rights . . . for any anticipated or future needs in excess of fifteen years,

   "[N]or shall any municipality be allowed to condemn water rights that are appropriated to a prior public use."

3. Conditions Precedent to Condemnation

   a. Community Growth Development Plan (§38-6-203(1)(a))

      "Prepare or update a community growth development plan reflecting present population and resources uses and capabilities and projected population growth and resources requirements, the latter to include all resources requirements to provide for phased development of municipal services and facilities."

   b. Detailed Statement (§38-6-203(1)(b))

      "Prepare a detailed statement describing:

      --"The water rights to be acquired under condemnation and their present uses;

--"The effects upon the county and suitable area within the river drainage basin or basins from the change or conversion of acquired irrigation and other water supplies to domestic uses, to include economic and environmental effects;

--"The unavoidable adverse and irreversible effects from such taking of properties and rights; and

--"Alternative sources of water supply that may be acquired by appropriation, purchase, lease, conservation, or condemnation and relative acquisitions costs."

c. Detail Required (§38-6-203(2))

"The information contained in the growth development plan and statement of effects from the condemnation shall be prepared in sufficient detail to provide a meaningful basis for assessment of the aspects of the condemnation to the public if the condemnation is approved. These statements shall be presented to the commissioners appointed by the court and the defendants and shall be made available to interested parties."

4. Determination of Necessity (§38-6-207)

"In any case initiated for the acquisition of water rights pursuant to this part 2, it is the duty of the commissioners to:

--"Examine and assess the growth development plan and statement provided by the municipality from the proposed condemnation required in section 38-6-203, and obtain necessary information pursuant to powers granted in section 38-6-208, and make a determination as to the necessity of exercising the power of eminent domain for the proposed purposes;

--"Provide one of the following recommendations to the court, based upon their findings;

- --"There exists no need and necessity for condemnation as proposed.
- --"There exists a need and necessity for condemnation as proposed.
- --"There exists a need and necessity for condemnation, but it is premature.

--"In making a recommendation, as provided in subsection (1)(b)(II) of this section, the commissioners may recommend an alternate source of water supply.

--"The commissioners shall hear the proofs and allegations of the parties and, after viewing the premises, certify the proper compensation to be made to said owner or parties interested for the water or other property to be taken or affected, as well as all damages accruing to the owner or parties interested in consequences of the condemnation of the same.

--"If the commissioners find there exists no need and necessity for the condemnation proposed, they shall make no finding as to the value of the condemned property."

Air Quality Control - Regulation of Real Estate Development

COLORADO AIR POLLUTION CONTROL
STATUTES AND REGULATIONS

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Publications

Note, "Death Penalty, In re Anderson", 58 Calif. L. Rev. 229 (1970).

Comment, "Judicial Supervision Over California Plea Bargaining: Regulating the Trade", 59 Calif. L. Rev. 962 (1971).

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COLORADO AIR POLLUTION CONTROL STATUTES AND REGULATIONS

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COLORADO AIR POLLUTION CONTROL STATUTES AND REGULATIONS

by Greg Hobbs

Chorus
I will put a spell upon the land. What shall it be?

Athene
Something that has no traffic with evil success.
Let it come out of the ground, out of the sea's water,
and from the high air make the waft of gentle gales
wash over the country in full sunlight, and the seed
and stream of the soil's yield and of the grazing beasts
be strong and never fail our people as time goes,
and make the human seed be kept alive.

Aeschylus, The Eumenides

A. The Regulatory Framework

1. Legislative Declaration of the Colorado Air Pollution Control Act of 1970

The lawmakers' dream of a sweet spell upon the mechanized world is found in the Air Pollution Control Act of 1970, C.R.S. 1973, 25-7-102:

> In order to foster the health, welfare, convenience, and comfort of the inhabitants of the state of Colorado and to facilitate the enjoyment of nature, scenery, and other resources of the state, it is declared to be the policy of the state to achieve the maximum practical degree of air purity in every portion of the state.

2. The Administrative Structure

The Colorado Air Act created a tripartite administrative mechanism consisting of the rule maker, the interim rule relaxer and the rule enforcer. The rulemaking authority of the Air Pollution Control Commission is broad in scope; so too is the rule suspension authority of the Air Pollution Variance Board; whereas the enforcement tools available to the Division of Administration of the Department of Health (Air Pollution Control Division) are relatively laborious and time consuming. However, the Federal Clean Air Act is a compulsive and pervasive overlay which not only shapes air pollution law in Colorado but also requires its enforcement. Hence, the practitioner must be aware of the extensive jurisdiction exercisable by the United States Environmental Protection Agency, even though his or her principal contact will probably occur with one or more of the three Health Department agencies.

3. The Rulemaking Authority of the Air Pollution Control Commission

a. Pollutants Which Are Subject to Regulation

Recognizing the complexity involved in controlling air pollution, the Legislature authorized a broad grant of rulemaking authority for the development and maintenance of a comprehensive program for the prevention, control, and abatement of air pollution throughout the state. The nine member Air Pollution Control Commission, appointed by the governor with the consent of the senate, is required to adopt a program for control of emissions from all significant sources of air pollution and to promulgate standards for the ambient air everywhere in the state. 25-7-105. The definition of "air contaminant" is sufficiently broad to include any airborne matter or gas except for water vapor and steam condensate. 25-7-103(1). While not limiting the type of air pollutants which are subject to the rulemaking authority, the Act specifies that the Commission may control visible pollutants, particulate matter, odors, open burning activity of any sort, organic solvents, photochemical substances and a whole host of ennumerated gases and chemical substances. 25-7-108(2).

b. Locations and Projects Which Can Be Regulated

The Commission is charged with the duty to identify and promulgate emission control regulations for each type of facility, process, or activity which actually, potentially or accidentally produces or might produce significant emissions of air contaminants. 25-7-108(3). Thus, except for motor vehicles or airplanes to the extent that federal law has preempted state regulation, the Commission has authority to write regulations affecting any man-made device or human activity which causes, results in or might produce the emission of air contaminants into the ambient air. The Federal Clean Air Act requires that the State must attain and maintain the federal ambient air standards (CAA,§110) but permits the State to enact standards and regulations which are more stringent than those required for compliance with federal law (CAA,§116). Only in the area of indirect sources, i.e., those facilities which attract substantial mobile source activity, 25-7-103(9), has the Legislature required that the Commission's regulations be no more strict than required for compliance with the Clean Air Act. 25-7-112(4).

The definition of "emission control regulation" is sufficiently broad to encompass any measure or strategy which will contribute to a reduction in any air contaminant. The definition includes any regulation which is promulgated to control air contamination from all sources in a specified area or from any specified facility, process, or activity and any regulation which is adopted for the purpose of preventing or minimizing emission of any air contaminant in potentially dangerous quantities. 25-7-103 (8).

c. The Permit Program

The Commission is also empowered and required to establish a permit program for pre-construction review and approval or disapproval of new air contamination sources. 25-7-112 (4). An air contamination source is any source whatsoever at, from, or by reason of which an air pollutant is emitted or discharged into the atmosphere. 25-7-103 (2).

No person may contruct or substantially alter any building, facility, structure, or installation, except single family residential dwellings, or install any machine, equipment or device, or commence any operation or activity which constitutes a new air contamination source without a permit from the Air Pollution Control Division. 25-7-112 (4). The definition of "person" subject to this pervasive review includes all individuals, businesses, governmental entities and any other "legal entity whatsoever which is recognized by law as the subject of rights and duties." 25-7-103 (12).

A "new" source also includes alterations to existing structures or activities which are capable of emitting additional amounts, volumes, sizes, weights, or types of air contaminants. Changing the location of an emission point also results in a new source which is subject to the permit system. Regulation No. 3-II.B.

The Division may attach whatever conditions it deems necessary for the new source to comply with Commission standards and regulations, including those for ambient air, on a continuous basis. 25-7-112 (4) (d); Regulation No. 3-II.H.1.a. & II.I.2. The permit application must be denied in the first instance if construction and operation of the new source, even with conditions applied and maintained, would not meet applicable "emission standards or regulations" of the Commission or would interfere with the "attainment or maintenance of federal primary or secondary ambient air standards." The permit may be granted in such event, in the discretion of the Commission, if use of best practical control alternatives would significantly reduce emissions and a violation of the State Air Quality Implementation Plan for meeting federal ambient air standards would not result. 25-7-112 (4) (d); Regulation No. 3-II.H.1.b.

Although state ambient air standards are not specifically mentioned as permit review criteria in the statute, their inclusion is apparent. The terms "emission standards" and "regulations" are used in the disjunctive so as to include review for specific emission limitations and whatever other regulations the Commission adopts for the purpose of implementing the legislative declaration, which, according to the language of 25-7-112 (4), the permit system must conform to. In addition, as previously mentioned, definition of "emission control regulation" includes "any standard promulgated by regulation" which prohibits or establishes permissible limits for specific types of emissions in a geographical area. 25-7-103 (8). Ambient standards which are adopted by regulation are designed to set permissible limits of specified pollutants in a geographical level, whatever the contributing sources of that pollutant may be. Emission standards set limits on the volume, weight or appearance of the pollutant stream as it is released from the discharge point, without regard to what ground level concentrations may result downwind under meteorological conditions in the area. The Act expressly allows the Commission to "promulgate" ambient air standards as rules which function to carry out the purposes of the Act. Beyond serving as goals for control measures, they are to be made a substantive part of the control program itself. 25-7-107 & 109.

Since 1971 the Commission has tied emission limitations and ambient air standards together as substantive criteria for new source review. Thus, the permit system allows Colorado to review and control the number and types of air contamination sources which may be built in any geographical area. Such control would not be possible using emission limitations only, unless the Commission chosen limitations were so stringent as to prevent any new construction for lack of technology to meet the limitations. Ambient standards when applied to pre-construction review of new sources operate as a compliment to emission limitations on existing sources by preventing degradation of existing air quality. Since the Act is intended to "reduce" and "prevent" air pollution throughout the State and achieve the "maximum practical degree of air purity in every portion of the state," 25-7-102, prevention of deterioration of existing air quality is an express aim of air pollution control in Colorado. A similar provision of the federal Clean Air Act was construed to require prevention of air quality degradation in areas which have not yet been polluted up to the federal secondary ambient air standards. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), ___ F.2d ___ (D.C.Cir. 1972), aff'd per curiam, 412 U.S. 541 (1973). The Clean Air Amendments now being considered in Congress contain express provisions for prevention of signicant deterioration and would mandate permissible ambient increments which are more stringent than required to meet the federal ambient standards.

Only in the field of indirect sources has the Colorado Legislature restricted the Commission from utilizing the permit system to implement a control program which is more stringent than the minimum required by the federal Clean Air Act, 25-7-112 (4). Indeed, "indirect sources" are defined under Colorado law as facilities which cause or induce mobile source activity which interferes with the attainment or maintenance of federal ambient air standards.

Thus, the permit system is the vehicle for incorporating all other parts of the Commission's regulatory program as applied to new construction or activities. Specific exemptions from the permit requirement are contained in regulation number 3-II.C.3. & E.

Conditions attached to a permit by the Division become binding if a permitee does not notify the Division within ten days of its refusal to accept the permit. Regulation No. 3-II.I.4. The applicant for a permit then has sixty days to perfect an appeal to the Commission, which may hear the matter itself or refer it to the Variance Board. 25-7-112 (4) (e); Regulation No. 3-II.H.3.b. This is consistent with the provisions of the Administrative Procedure Act which states that refusal by an applicant to accept a limitation imposed on a license shall be treated as a denial of the license and that appeal from a denial must be taken within sixty days of the denial. 24-4-104 (9) & (11). Commencing work under an emission permit constitutes acceptance of all the conditions thereof. Regulation No. 3-II.I.1.

An outright denial of a permit by the Division is subject to the same time requirements and procedures for appeal as a refusal to accept a permit as conditioned by the Division. Regulation No. 3-II.H.3.b. The applicant who seeks an order reversing the Division's decision bears the burden of proof. 24-4-105 (7). On appeal, the Commission may order the Division to issue the permit on such terms and conditions as the Commission determines are necessary and reasonable to carry out the objectives of the Act. 25-7-112 (4) (f). Each application for a permit is subject to a $25.00 fee and each issuance of a permit is subject to an additional fee, the amount of which is determined according to a scale of charges up to $800.00 per permit application and an additional fee of $200.00 if a state-developed predictive model is utilized in the course of permit review. 25-7-112 (5) (a); Regulation No. 3-II.K.

New sources of fugitive dust are required to pay only a $25.00 fee in addition to the $25.00 application fee. Regulation No. 3, Schedule II, page 3.13.

A permit may be revoked by the Division when any condition thereof has been breached by the permitee. 25-7-112 (4) (e); Regulation No. 3-II.H.3.a.(ii). The Commission has adopted a policy statement which declares that variance requests will not be considered in association with a permit denial or revocation proceeding. This statement indicates the Commission's preference for implementing the Act's legislative declaration, as applied to new sources, under the permit system rather than the cease and desist order procedure which was designed primarily to bring existing sources into compliance with immediately effective emission limitations. New sources are expected to start up operation in full compliance with all provisions which apply to it and to maintain that state of compliance. The variance procedure is available when regulations are subsequently changed and additional time is needed to implement the required degree of control. Unforseeable equipment failures excuse a new source from compliance for the period necessary to implement corrective action as soon as possible, provided the Division is notified immediately. Common Provisions, Regulation II. D. Thus, a permit cannot be revoked when this occurs. In any revocation proceeding the burden of proof is upon the Division to show violation of a permit requirement.24-4-105 (7). The revocation order is stayed by operation of law until decision by the Commission or, if a further appeal is taken, by the District Court. 25-7-117 (1).

d. Constraints Upon Commission Rulemaking Authority

In exercising its broad rulemaking authority, the Commission is bound by certain ennumerated standards. The rulemaking hearing is to be conducted in accordance with the Administrative Procedure Act, 24-4-105. Notice of the hearing must be given sixty days prior to the hearing and the Commission must circulate with the hearing notice a copy of its proposed ambient air standard or emission control regulation, or any change it proposes to an existing standard or regulation. 25-7-109(1). In formulating each emission control regulation, the Commission must consider certain factors, including the legislative declaration to the Act, federal recommendations, the degree to which more stringent regulation is needed in some areas of the State as compared to others, the availability and feasibility of control techniques, the significance and nature of the emission to be controlled, and the need for specifying safety precautions with respect to any particular emission or source of emission. 25-7-108(1).

As long as the Commission follows the notice and hearing procedures, considers the ennumerated factors and acts within the scope of its legislative delegation, the probability is that any regulation which it adopts will be sustained absent a showing that it acted arbitrarily and capriciously in the exercise of its authority. The Colorado Supreme Court has held that the Air Pollution Control Act of 1970 does not unconstitutionally delegate legislative authority to an administrative agency. Lloyd A. Fry Roofing Company v. State Department of Health Air Pollution Variance Board, 179 Colo. 223, 499 P.2d 1176 (1972).

4. Judicial Review of Commission Rulemaking

The procedure for initiating judicial review of a Commission rulemaking proceeding is less clear. The only provisions regarding judicial review are found among the enforcement sections of the Act in reference to any final "order" or "determination" of the Variance Board, the Division, or the Commission. 25-7-117. Since the Commission has joint authority with the Variance Board to determine violations, issue or terminate variances, suspend the effect of a Division cease and desist order (25-7-113 & 115), or order that a permit application be granted or denied (25-7-112(4)(f), the use of the words "order" or "determination" and the glaring omission of any mention of rulemaking appears to restrict 25-7-117 to judicial review of enforcement, variance, and permit proceedings.

The question is important since section 117 requires that review be initiated within twenty days of a final order or determination. If review is timely sought in the district court where the air contamination source is located, the order or determination is automatically stayed pending the decision of the court. 25-7-117(1) & (3).

If section 117 does not apply to judicial review of Commission rulemaking proceedings, then 24-4-106 of the Administrative Procedure Act would control in full. An aggrieved party would have sixty days in which to petition for review, would be required to file the action in the City and County of Denver, and would have to make a showing to the Court of irreparable injury if it wished a stay of the regulation's effect pending review.

Commission rulemaking, like all rulemaking in the State, is subject to review for legality by the Attorney General. 24-4-103(8)(b). An adverse Attorney General's opinion subjects the rule to challenge and likely stands as a confession of error by the State in any judicial proceeding.

5. Regulations Currently In Effect

The Commission has been very active during its six years of existence. Regulations currently in force include comprehensive regulations for control of particulate matter, smoke, fugitive dust and sulfur oxides (Regulation No. 1); odor emission control (Regulation No. 2); permits to contruct and operate (Regulation No. 3); existing wigwam waste burners (Regulation No. 4); existing alfalfa dehydration plants (Regulation No. 5); standards of performance for certain types of new stationary sources (Regulation No. 6); gasoline vapor control and control of organic solvents (Regulation No. 7); chemical substances and physical agents (Regulation No. 8); transportation restraints and carpool incentives (Regulation No. 9). In addition, the Commission has promulgated a Common Provisions Regulation which states policy and defines terms which control the numbered regulations and a set of ambient air standards.

Before advising a client the attorney should carefully examine each of the regulations in the context of the client's plant or activity. The regulations do not always apply uniformly across the State, and each regulation carries its own exemptions. Moreover, a client planning to build or modify a direct or indirect air contamination source ought to be carefully advised with respect to permit requirements.

6. Local and Federal Rulemaking and Enforcement Authority

Compliance with the Commission regulations does not ensure that the client has satisfied all air pollution requirements. Under 25-7-125 any local unit of government may enact air pollution requirements which are more comprehensive or stringent than those of the State. Compliance with local law does not excuse compliance with State law. 25-7-125(1). Compliance with State and local law does not ensure compliance with federal law since the Environmental Protection Agency has independent rulemaking and enforcement powers. If EPA disapproves a regulation submitted to it by the State for inclusion in the Colorado Implementation Plan, EPA may promulgate differing regulations.

Thus, the attorney should be aware of the current status of the federally approved implementation plan and any additional federal requirements which affect his or her client. For example, as of this writing the EPA has not yet acted to approve Colorado's revised fugitive dust regulation (Regulation No. 1-II.D.) or its gasoline vapor control regulation (Regulation No.7).

In these areas EPA has enforceable rules which differ from Colorado's.

In addition, EPA has disapproved portions of the State's control strategy, has promulgated certain substitute portions to the State Implementation Plan, and has imposed other requirements.

On November 7, 1973 the Administrator required Colorado to develop land use and transportation controls in order to attain and maintain the federal ambient air standards for photochemical oxidants and carbon monoxide in the Denver Metropolitan Air Quality Control Region. 38 Federal Register 30821. Specified measures called for the adoption of legislation and regulations for inspection and maintenance of emission control systems on automobiles manufactured after 1967, retrofit air pollution control devices to be installed on automobiles of model years 1968 through 1974, designation of bus and carpool lanes, limitations on construction of new parking facilities, restriction of on street parking, and high altitude tuning specifications. 40 C.F.R. 52.326. To date, implementation by Colorado has consisted of a carpooling planning regulation (Reg.No. 9), some mass transit improvement by RTD, and establishment of bike paths and several exclusive bus and car pool lanes by the City and County of Denver.

EPA takes the view that it has authority under the Clean Air Act to compel states to adopt laws, regulations, and programs necessary to implement the transportation control plan. One circuit court has partially adopted this view, insofar as construction of bus lanes, purchase of additional buses, and registration of cars that comply with federal inspection/maintenance and retrofit regulations promulgated by the Administrator is concerned. *Commonwealth of Virginia v. Train*,(521 F.2d 971 (D.C.Cir.)). At the same time, the District of Columbia circuit also ruled that EPA cannot require states to enact specific legislation carrying out transportation controls or to compel them to administer and enforce inspection/maintenance and retrofit programs. *Train v. District Court*,(521 F.2d 971 (D.C. Cir.)). Two other circuit courts have ruled that EPA cannot sanction a state for failure to implement a transportation control plan, since the Administrator's only option under the Clean Air Act is to adopt regulations and enforce them through his enforcement powers. *Environmental Protection Agency v. Brown*,(521 F.2d 827 (9th Cir.)); *EPA v. Maryland*, 44 U.S.L.W. 2153 (4th Cir.)). As titled above, these four cases are now before the United States Supreme Court on grant of certiorari, 44 U.S.L.W. 3681.

The Administrator has also disapproved Colorado's control strategy for failure to adopt significant deterioration regulations for control of particulates and sulfur dioxide throughout the State, 40 Federal Register 25007 (June 12, 1975) and has substituted regulations which the Administrator promulgated on a nationwide basis in December of 1974. 40 C.F.R. 52.21. These regulations apply to certain types of stationary sources such as power plants, petroleum refineries, coal cleaning plants, portland cement plants, fuel conversion plans, phosphate rock crushing plants and large municipal incinerators, among others. The regulations prescribe three categories of ambient air increments which apply to prevent or restrict the location of new sources in varying degrees which depend upon the classification of the geographical area in question. One of the categories would allow pollution up to the secondary ambient air quality standards; consequently, Colorado has joined New Mexico and Wyoming in a lawsuit seeking to declare that portion of the regulations as invalid, as well as another portion which allows EPA to review and determine whether the State has properly classified all land within its boundaries.

On December 18, 1975 the Commission published regulations now in effect which apply stringent ambient air increments for sulfur dioxide in the State and is enforcing them through the new source permit program. In some respects these standards are more stringent than those specified in the EPA regulations. However, it is clear from a recent Supreme Court case that the Administrator may approve,as part of the State Implementation Plan, requirements which are more stringent than those necessary to meet the basic requirements of the Clean Air Act. Union Electric Company v. Environmental Protection Agency, 44 U.S.L.W. 5060 (June 25, 1976). This repeats the principle of Train v. Natural Resources Defense Council, 95 S. Ct. 1470 (1975) that the states are principally responsible for their air quality, so long as the minimum standards of the Clean Air Act are met. The Court has held, however, that the states cannot subject federal facilities to permit and enforcement procedures, but they may bring a citizen's suit under the Clean Air Act to require a federal facility to comply with emission standards. Hancock v. Train, 96 S. Ct. 2006 (1976). Since the prevention of significant deterioration program by the states basically utilizes a permit program for control within the ambient air increment, it appears that the federal government will have to administer a pre-construction review program of its own for federal facilities or face suits by states under the Clean Air Act to uphold that Act.

Another area in which the Administrator has promulgated regulations for Colorado is the field of indirect source controls. On February 25, 1974, 39 Federal Register 7280, EPA disapproved the plan in part and substituted regulations which apply to new highway and airport construction. 40C.F.R. 52.22 (b), (c), (d), (e) and (f). EPA has also promulgated regulations which control construction of other indirect sources, such as shopping centers and parking lots, but suspended their effect.

Of the eight air quality control regions in Colorado, five are in excess of the primary ambient air standard for particulate matter and another is in excess of the secondary standard. One region (Denver) is in excess of the primary standards for the automobile related pollutants, hydrocarbons and carbon monoxide. Colorado has designated five areas of the State as air quality maintenance areas for the purpose of formulating revised control strategies aimed at attaining and maintaining federal standards. A difficult problem has been the contribution of dust sources to the airborne particulate load.

7. Anticipated Regulations

As of April 1976, seven of the nine commissioners had been appointed to the Commission within a year's time. This "second generation" Commission faces the difficult task of formulating a program for Colorado in the area of transportation control and energy development. Heretofore, as in other parts of the country, air pollution control has focused on existing stationary sources. The effort has been development and application of technology to roll back pollutant emissions. In the face of gains from such rollback is the pressure of development which portends additional automobiles,and facilities of a size and nature heretofore unknown in Colorado. At present, apart from the siting authority inherent in the zoning laws of local government and the ability of the Land Use Commission to request designation of certain areas for particular purposes, the air pollution and water pollution permit systems are the only siting mechanisms available to the State. Inevitably,the Commission must seek out the best meteorological, medical, scientific, technical, social and economic information it can obtain. And, somehow, in the midst of all this, the Commission must also consider purely aesthetic values which preserve to the citizens of Colorado the beauty and the glory that preceded them. So much, then, is said so simply in the Commission's ambient air regulation for sulfur dioxide which classifies most of the State as pristine until a request for redesignation is recieved and a public hearing is held in the affected area to consider:

> (1) growth anticipated in the area,(2) the social, environmental and economic effects of such redesignation upon the area being proposed for redesignation, and (3) any impacts of such proposed redesignation upon regional, state or national interests.

B. The Enforcement Mechanism

1. Notice of Violation and Cease and Desist Order

The enforcement mechanism for existing sources is contained in 25-7-113. Upon learning of emission control violation the Division must issue a notice of violation to any person responsible for the violation and attempt to obtain voluntary compliance. The definition of "person" which is subject to enforcement includes any individual or legal entity whatsoever, including any governmental entity. 25-7-103(12). If the violation continues or is repeated the Division, no later than six months after the original notice of violation, must issue a cease and desist order requiring compliance within a time which may be set by the Division not to exceed another six months. 25-7-113(3).

2. Administrative Review of Cease and Desist Orders; Variance Requests.

Any challenge to a cease and desist order must be filed, within twenty days of its receipt, with the Commission or the Air Pollution Variance Board, if the occurrence of a violation is to be challenged. If only a variance is sought, the petition may be filed thirty days prior to the effective date of the cease and desist order. 25-7-113(4). Both the Commission and the Variance Board have authority to determine whether the violation occurred and whether a variance should be granted, 25-7-113(4) & 115, but usually the Commission refers a hearing request under the enforcement provisions to the Variance Board. The filing of a hearing request stays the cease and desist order pending final determination.25-7-113(4)(c).

The Variance Board has considered requests for variances even though the person making the request was not cited by the Division. However, when the person has been cited for a violation, it is the policy of the Board to determine whether a violation occurred before it will reach the question of granting a variance. This accords with the Act since a person who receives a cease and desist order is entitled to only one administrative hearing on the order.25-7-113 (4)(b). If a person does not challenge the Division's finding that a violation occurred, he most likely has waived his right to do so and may not be able to raise the issue in any court action for failure to exhaust his administrative remedies.

By Common Provisions Regulation §II.J., any request for a variance hearing, whether or not it results from an enforcement order of the Division, must be accompanied by a compliance plan which contains a detailed schedule for abating any violation that may exist. With its technical background, the nine member Variance Board has primary interest in seeing that proper control devices are designed and constructed so that full compliance will be acheived by the time the variance expires.

3. Circumstances For Granting Variances

The Variance Board or the Commission may suspend or modify the enforcement of any regulation or order issued under the the Act when it determines that control techniques are not available or compliance would create an unreasonable economic burden. However, in doing so, it must determine that the variance would be consistent with the legislative declaration. 25-7-115(1). The variance must be granted if compliance would result in an arbitrary and unreasonable taking of property or the closing of a business, unless a sufficient corresponding public benefit would result. 25-7-115(2). Any variance may be limited in time and under such conditions as the Board or Commission may specify. 25-7-115(4).

4. Termination of the Variance

A variance may be terminated or modified after a hearing by the Commission or the Variance Board. 25-7-115(3). However, the variance becomes null and void if a person fails to meet any of its conditions without prior approval of the Board or Commission. 25-7-115(4). A variance granted by the Board may be reviewed and reversed by the Commission if the Commission concludes, within thirty days of its issuance, that the variance interferes with the objectives set forth in the legislative declaration and then, on request of the variance applicant, holds a hearing on the matter. 25-7-116(9).

Since a variance has the effect of staying a cease and desist order, the termination of a variance revives the enforceability of the order.

5. Judicial Review of a Finding of Violation or a Variance Decision

Any final order of the Division, Commission, or Variance Board is reviewable by petition filed within twenty days in the district court where the air contamination source is located. The administrative determination or order is automatically stayed pending decision of the court. 25-7-117. The Division has the same rights to judicial review as any other party. 25-7-116(2).

6. Compliance Inspections

By 25-7-106(6) and Common Provisions Regulation §II.C., the Division may require the owner or operator of any source to conduct performance tests for the purpose of ascertaining compliance with emission control regulations. In addition, the Division may enter upon private property to conduct compliance investigations. However, if consent to enter is refused, the Division must obtain a warrant. 25-7-110(2)(c). Since the warrant is required by statute when consent is denied, it must be obtained despite the ruling in *Air Pollution Variance Board v. Western Alfalfa Corporation*, 416 U.S. 861 (1974), that, under the plain view doctrine, inspection of a visible smoke plume may take place on publicly accessible portions of private property even when consent is denied.

The Colorado Court of Appeals, on remand from the United States Supreme Court in the *Western Alfalfa* case held that state and federal due process requires contemporaneous notice of administrative evidence gathering when the evidence "by its nature exists only temporarily" or "can be preserved only through the subjective observations" of an agency employee(the inspection consisted of opacity readings to ascertain compliance with that part of Regulation No. 1 which restricts visible emissions). *Western Alfalfa Corporation v. Air Pollution Variance Board*, 534 P. 2d 796 (1975), which is now awaiting decision by the Colorado Supreme Court together with an appeal by the Lloyd A. Fry Roofing Company from a jury decision in which the State obtained a civil penalty of $41, 500.00.

7. Injunction and Civil Penalties

The Commission may institute an injunction proceeding for violation of any final cease and desist order which is not subject to a stay pending administrative or judicial review. 25-7-118. The Division may seek civil penalties of up to two thousand five hundred dollars per day for each day on which there occurs violation of a final cease and desist order thich is not subject to a stay pending administrative or judicial review. 25-7-119. Any source which has not filed an air contaminant emission notice as required by 25-7-112(1) is subject to a civil penalty of up to one hundred dollars. The Colorado Air Pollution Control Act does not provide for criminal penalties. However, criminal penalties are prescribed in the motor vehicle code for any person who tampers with a motor vehicle emission control device or who drives an automobile knowing that its emission control device has been tampered with. 42-4-1210.

Any person who violates a local governmental emission control regulation is subject to a civil penalty of not more than three hundred dollars for each day of violation. 25-7-125(8).

The remedies provided in the Air Act are cumulative and additional to all others that exist by law. Common law actions for nuisance are preserved. 25-7-123.

8. Emergency Powers

The Division has authority to seek immediate equitable relief to prevent or abate air contamination which threatens immediate danger to the public health. 25-7-111. Under the same section the Division may also request the Governor to declare an air pollution emergency and to invoke his power to take all necessary steps to protect the public health. Neither consent nor a warrant is required to inspect private property in an emergency situation. 25-7-110(2)(c).

C. Public Participation in Air Pollution Control

1. Appearance at Rulemaking and Enforcement Proceedings

Any person may become a party to a Commission rulemaking proceeding by filing a counterproposal to the Commission's proposed regulation not less than twenty days prior to the hearing, 25-7-109(2), or by filing a written request in conformance with 24-4-105(2) of the Administrative Procedure Act. In accordance with 24-4-103(4) of the Administrative Procedure Act, it is the Commission's practice to hear the comments of all citizens and organizations at the hearing whether or not they have requested to be parties. However, non-party participants probably cannot insist upon the right to cross-examination of witnesses. See 25-7-109(3); 24-4-105(2). The Commission must send its hearing notices together with copies of its proposed regulations to all persons who file a written request to receive such notices. 25-7-109(1).

In enforcement and variance proceedings the Variance Board or the Commission, in their "sole discretion", may admit as parties persons who are "affected" by the proceedings but who are not otherwise adequately represented. 25-7-116(5). The language with respect to sole discretion conflicts with the Administrative Procedure Act, 24-4-105, which requires that an affected person be admitted upon proper written request. Denial of a request for party status may in certain circumstances raise due process questions. The State Supreme Court has upheld the right of the Variance Board to allow the intervention of citizen groups in its sole discretion, Lloyd A. Fry Roofing Company v. Department of Health, supra, 179 Colo. at 233, 499 P.2d at 1181, but has not been called upon to determine whether denial of intervention might constitute a due process violation in certain instances.

The procedural rules of the Variance Board require a petition specifying reasons for seeking party status to be filed seven days in advance of the hearing. Operational Guidelines of the Air Pollution Variance Board, §§11 & 12.

2. Additional Provisions for Public Participation

The Commission is required to hold an annual public hearing in October for the purpose of taking public comment and answering questions with respect to the air pollution control program. Prior to this hearing the Commission must issue a report to the public on the status of the regulatory and enforcement program. 25-7-105(4) & (5).

On receiving a written and verified citizen complaint, the Division must promptly investigate whether any violation of an emission control regulation has occurred. 25-7-113(2).

In accordance with the Federal Clean Air Act, emission data obtained by the Commission or Variance Board cannot be kept confidential and must be made available for inspection by the public. 25-7-129.

The Division must allow the public to inspect any permit application and its accompanying data, as well as the Division's analysis of the proposed project or activity. 25-7-112(4)(c).

Conclusion

The Colorado Air Pollution Control Act of 1970 is a comprehensive statute which weds technology and the law. Taken together with local and federal air pollution requirements, it presents a formidable and extremely interesting field for the practitioner, with important ramifications for the people of the State.

Recent Developments -

Colorado Air Pollution Cases

On August 23, 1976 the Colorado Supreme Court issued its decisions in Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation, ____ Colo. ____, ____ P.2d ____ (No. C-682, 8/23/76) and Lloyd A. Fry Roofing Company v. The State of Colorado Department of Health Air Pollution Variance Board, ____ Colo. ____, ____ P.2d ____ (No. 27093, 8/23/76).

In Western Alfalfa a Colorado health inspector had entered the premises of the company and took a series of opacity readings which showed violation of the State's visible emission standard. Two weeks later the Health Department issued a cease and desist order based on the opacity readings. The company first learned of the inspection when it received the cease and desist order requiring it to abate the violations. The United States Supreme Court held that the plain view doctrine permits an air pollution inspector to proceed without consent or warrant onto the publicly accessible portions of private premises for the purpose of observing emissions from a smokestack. Air Pollution Variance Board v. Western Alfalfa Corporation, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed. 2d 607 (1974).

On remand, following a subsequent decision of the Colorado Court of Appeals, the Colorado Supreme Court has now held that procedural due process and fundamental fairness, under the United States and Colorado constitutions, requires that notice of a visual opacity reading must be given "within a reasonably short period of time following the completion of the inspection." In so holding, the court observed that opacity readings may be affected by many variables such as wind speed and direction, the time of day, the nature of the ambient air conditions, and the position of the observer. The court held that the opacity standard and its method of application are constitutional, that opacity readings can be the sole basis for a finding of violation, and that the weight to be given to individual readings is solely a matter for the trier of fact, whether a judicial or administrative body. However, the court held that failure to give reasonably prompt notice of inspection "reduced the ability of the company to offer meaningful rebuttal evidence." Although the court did not require prior or contemporary notice of the inspection since "surprise may play a crucial role in the course of some inspections", the court said that "[B]asic fairness is achieved in this context by delivering actual notice to a plant manager or officer or agent thereof within a short period of time following the inspection."

The court also held that "public enjoyment" of air resources is a stated legislative objective of the Colorado Air Pollution Control Act and that regulations may be promulgated and enforced in order to achieve "maximum visual clarity ... in any given air space."

In the Fry Roofing case, the Colorado Supreme Court reviewed a judgment awarding the State an injunction and $41,500.00 in civil penalties for violation of a cease and desist order which had required the company to comply with the visible emission regulation of the Air Pollution Control Commission. The court invalidated seventy-seven citations for failure to give notice of inspection required by Western Alfalfa but upheld six citations where the plant manager had been handed a copy of the inspector's opacity readings after the observations had been completed. On that basis, the court upheld the injunction which required Fry to install air pollution control equipment acceptable to the Health Department and the court or else close down the operations.

The court held that proceedings for injunction and the collection of civil penalties under the Colorado Air Act are equitable in nature, need not be tried to a jury, and are civil, not criminal, in nature, and therefore not subject to the special procedural safeguards attendant on a criminal proceeding. The court also held that the Air Act authorized an injunction for violation of a Health Department cease and desist order and that irreparable injury need not be shown by the State. The court said that "[A] violation of the air quality standards embodies, in any case, sufficient injury to the public interest to permit the injunctive remedy." The court observed that the Colorado Air Act was intended to "achieve the maximum practical degree of air purity in every portion of the State." Fry had argued that some demonstrable health effect or other effect upon plants or animals must be shown.

As to Fry's defense that the plume contained visible water which affected the validity of opacity readings, the court held that the weight to be given opacity readings is the exclusive province of the trier of fact. The inspectors had testified concerning their instructions to read a "wet plume" beyond the breakpoint where steam condensate evaporates back into the ambient air. But the inspectors testified that they had never seen a breakpoint in association with the Fry plume. The court noted that the prevailing ambient conditions at any given time may be such that water vapor in a particular plume may not condense so that it becomes visible.

National Flood Insurance Program

NATIONAL FLOOD INSURANCE PROGRAM

JOHN E. BUSH

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Arapahoe County Bar Association

NATIONAL FLOOD INSURANCE PROGRAM[1]

Under the National Flood Insurance Program, HUD is authorized to establish and carry out a national flood insurance program to enable all persons to purchase insurance against loss from flood damage. 42 USCA §4001.

LAND USE CONTROLS

No flood insurance coverage shall be provided under the program unless community adopts adequate land use and control measures consistent with comprehensive criteria for land management under 42 USCA §4102. 42 USCA §4022.

IDENTIFICATION OF FLOOD RISK AREAS

HUD is required to identify and establish flood plain areas and flood risk zones within those areas. 42 USCA §4101.

LAND USE CRITERIA

HUD is required to develop comprehensive criteria for adoption by local authorities which, to maximum extent feasible, will:

> "(1) constrict the development of land which is exposed to flood damage where appropriate,
> (2) guide the development of proposed construction away from locations which are threatened by flood hazards,
> (3) assist in reducing damage caused by floods, and
> (4) otherwise improve the long-range land management and use of floodprone areas,"

42 USCA §4102(c).[2]

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[1] For good background statement of legislation history and purpose see The Flood Disaster Protection Act of 1973, Barry Lee Myers, BUSINESS LAW JOURNAL (Jan., '76)

[2] See Exhibit A, Rules, Criteria for Land Management and Use 24 CFR 1910 (see also Proposed Criteria, Federal Register, Vol. 40, No. 59)

PURCHASE OF FLOOD DAMAGED PROPERTY

HUD may purchase insured properties damaged by flood. 42 USCA §4103.

APPEAL OF HUD FLOOD ELEVATION DETERMINATION

Individuals and communities may appeal HUD determination of flood elevations established for land use purposes. 42 USCA §4104.

NOTICE TO BORROWER - HAZARD AREA

Financial institution required to give borrower notice that property is located within special flood hazard area. 42 USCA §4104a.

NOTICE TO COMMUNITY - SPECIAL FLOOD AREA

HUD required to notify communities of HUD identification of one or more areas of special flood hazards within community. 42 USCA §4105.

SANCTIONS

Communities which do not qualify for the national flood insurance program within one year after notification or July 1, 1975, whichever is later, become subject to sanctions of Act. 42 USCA §4105.

EFFECT OF NONPARTICIPATION

(a) Federal Assistance. No federal agency may approve any financial assistance for acquisition or construction purposes or, after July 1, 1975 in area identified as having special flood hazard unless community is then participating in flood insurance program.

(b) Financing. All federally regulated financial institutions prohibited from making, increasing, extending or renewing any loan secured by improved real estate or mobile home located in designated special flood hazard unless community is then participating in flood insurance program; except prohibition doesn't apply to loan made prior to 3/1/76 to finance acquisition of a previously occupied home. 42 USCA §4106.

SUMMARY OF GUIDELINES[3]

Introduction. The Flood Disaster Protection Act of 1973 requires the purchase of flood insurance on or after March 2, 1974 as a condition of receiving any financial assistance from a federal or federally related institution for acquisition or construction in an identifiable flood plain area having special flood hazards located within a community participating in the National Flood Insurance Program. After July 1, 1975 the requirements will apply to all identifiable special flood hazard areas within the United States.

Federal Assistance. Federal or federally related financial assistance includes not only loans and guarantees such as FHA and VA but also any loan from a federally insured or federally regulated institution such as commercial banks.

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[3] Federal Register, Vol. 39, 26186-93.

Acquisition/Construction. Acquisition or construction purposes include all forms of construction, reconstruction, repair, or improvement to real estate whether or not the value of the building is enhanced.

Emergency and Regular Programs. Communities entering the National Flood Insurance Program generally do so in two phases. First, they become eligible for sale of flood insurance through the emergency program. After the flood insurance rate study has been completed and preliminary land use plan submitted, a community enters the regular program.

Coverage. Limits of coverage under the emergency program are $35,000.00 on single family dwellings, $100,000.00 on all other types of buildings, with $10,000.00 per building available for residential contents and $100,000.00 per building for contents of non-residential buildings. Limits of coverage under the regular program are double those stated for the emergency program.

Boundary and Rate Maps. The special flood hazard areas are designated by the publication of flood hazard boundary maps. Upon acceptance in the regular program, the rate map is published.

Buildings Covered. All types of industrial, commercial, and agricultural buildings are covered (any walled or roofed structure). Each structure must be separately covered. Exception: single family may include 10% on appurtenances. Mobile homes are eligible if on foundations, either permanent or not, and either with or without wheels. Condominiums are treated as single family if traditional townhouse or row house. Highrise or vertical condominiums are eligible as a unit. Condominium unit owners are entitled to purchase individual contents coverage. Home improvement loans are also within the requirements of the law.

Secondary Market. FDIC, Federal Reserve Board and Comptroller have construed term financial assistance to include only origination of mortgage loans and not the purchase of loans in the secondary market.

Assumption of a loan does not require the purchase of flood insurance. However, any subsequent extension, increase, or renewal, flood insurance is required if the insurance purchase requirement has become applicable to the property.

Personal Property. Flood insurance is required on personal property only when the loan from a private lender involves not only a security interest in the personal property but also a security interest in real estate or a related real estate loan is extended or refinanced at the same time as the personal property loan.

Private Loans. Private loans for personal property that do not involve direct or indirect federal assistance or loans on real estate are not subject to the federal insurance purchase requirement.

Identification of Hazard Area. The burden of determining the location of the real property to be financed is on the lender and cannot be discharged by obtaining documentation from the borrower. An appraisal or personal verification is suggested. Lenders decision as to location of property made in exercise of due diligence and good faith is final.

TIMETABLE FOR INSURANCE REQUIREMENTS. Prior to July 1, 1975 insurance purchase requirements exist when:

1. Property is located in formally identified special flood hazard areas, (i.e., areas where boundary maps have been issued), and

2. The community is participating in the program and flood insurance is being sold on properties in the area at the time of closing or commitment.

Subsequent to July 1, 1975 or one year after notification, whichever is later, no loan may be made in areas identified as having special flood hazard unless community is participating in flood insurance program. See 42 USCA §4105.

Suspension. If community is suspended from the program, the loan may not be increased, extended, or otherwise modified.

Notification to Borrower. Bank must notify borrower as soon as possible and not less than ten (10) days in advance of closing that property is in flood hazard area. The bank, prior to closing, shall obtain a written acknowledgement from borrower that he realizes that property is in a special flood hazard area.

Suggested guideline is that lender provide notice to borrower through loan approval or commitment that if flood insurance purchase requirement is applicable on date of closing it will be implemented provided that the status does not change thirty (30) days after loan approval or commitment.

Amount. Flood insurance is required in the amount of the loan or the maximum amount available under the program, whichever is less. However, may reduce for land value. Lender has no obligation to increase when community enters regular program. (See Coverage above.)

Documentation. Federal supervisory instrumentalities will require lender to have copy of policy endorsed to show lender as beneficiary. It appears that at time of closing, a copy of the policy application together with proof of payment will suffice since there is a fifteen (15) day waiting period for issuance of policy.

As to construction, proof not required until first funds disbursed. Lenders are required to determine renewal and maintenance during duration of loan. Lender will have option of renewing policy or calling loan.

Security Interest and Additional Security. The insurance requirement pertains to the making, increasing, extension, or renewal of a loan secured by improved real estate in an identified hazard area. Therefore, insurance not required if security interest not taken. On the other hand, if security interest taken only as additional security and not in connection with adjustment in real estate loan, the insurance requirement does not apply. (However, definitive ruling from HUD has not been issued on these points as of this date.)

Status - Flood Hazard. Monthly listings of community status issued by HUD. More current information can be obtained from Servicing Agent, CNA Insurance Company. Summary of status (see Exhibit B attached for listing):

Total in Program	163
Regular	9
Emergency	154
With Hazard Area Identified	126
Withdrawn	2

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3535(d); sec. 1306, 82 Stat. 575; 42 U.S.C. 4013; sec. 1361, 82 Stat. 587; 42 U.S.C. 4102.

SOURCE: The provisions of this Part 1910 appear at 36 F.R. 24762, Dec. 22, 1971, unless otherwise noted.

Subpart A—Requirements for Land Use and Control Measures

§ 1910.1 Purpose of subpart.

(a) Section 1315 of the Act provides that flood insurance shall not be sold or renewed under the program within a community after December 31, 1971, unless the community has adopted adequate land use and control measures consistent with Federal criteria. Responsibility for establishing such criteria is delegated to the Administrator.

(b) This subpart sets forth the criteria developed in accordance with section 1361 of the Act by which the Administrator will determine the adequacy of a community's land use and control measures. These measures must be applied uniformly throughout the community to all privately and publicly owned land within flood-prone or mudslide areas. Except as otherwise provided in § 1910.5, the adequacy of such measures shall be determined on the basis of the standards set forth in § 1910.3 for flood-prone areas and in § 1910.4 for mudslide areas.

(c) Nothing in this subpart shall be construed as modifying or replacing the general requirement that all eligible communities must take into account flood and mudslide hazards, to the extent that they are known, in all official actions relating to land use and control.

§ 1910.2 Minimum compliance with land management criteria.

(a) A flood-prone community which becomes eligible for sale of flood insurance prior to December 31, 1971, must have land use and control measures in effect by that date which at least meet the requirements of § 1910.3(a) in order to remain eligible after that date. In addition, the community must meet the respective requirements of § 1910.3 (b), (c), (d), or (e) within 6 months from the date it receives the data required for compliance with the applicable paragraph or by December 31, 1971, whichever is later.

(b) A flood-prone community applying for flood insurance eligibility after December 31, 1971, must meet the standards of § 1910.3(a) in order to become eligible. Thereafter, the community will be given a period of 6 months from the date it receives the data set forth in § 1910.3 (b), (c), (d), or (e) in which to meet the requirements of the applicable paragraph.

(c) A mudslide-prone community which becomes eligible for sale of flood insurance prior to December 31, 1971, must have land use and control measures in effect by that date which meet the requirements of § 1910.4(a) to remain eligible after that date. In addition, the community must meet the requirements of § 1910.4(b) within 6 months after the date its mudslide areas having special mudslide hazards are delineated or by December 31, 1971, whichever is later.

(d) A mudslide-prone community applying for flood insurance eligibility after December 31, 1971, must meet the standards of § 1910.4(a) in order to become eligible for such insurance. Thereafter, the community will be given a period of 6 months from the date the mudslide areas having special mudslide hazards are delineated in which to meet the requirements of § 1910.4(b).

(e) Communities identified in Part 1915 of this subchapter as containing both flood plain areas having special flood hazards and mudslide areas having special mudslide hazards must adopt land use and control measures for each type of hazard consistent with the requirements of §§ 1910.3 and 1910.4.

(f) Local flood and mudslide land use and control measures should be submitted to the State coordinating agency designated pursuant to § 1910.25 for its advice and concurrence. The submission to the State should clearly describe proposed enforcement procedures.

(g) The community official responsible for submitting annual reports to the Administrator pursuant to § 1909.22(b)(2) of this subchapter shall also submit copies of each annual report to any State coordinating agency and to other appropriate State and local bodies, and shall inform the Administrator of the agencies to which the annual reports are sent.

§ 1910.3 Required land use and control measures for flood-prone areas.

The Administrator generally will provide the data upon which land use and control measures must be based. If the Administrator has not provided sufficient data to furnish a basis for these measures in a particular community, the community may initially use hydrologic

Exhibit A - Page 2

and other data obtained from other Federal or State agencies or from consulting services, pending receipt of data from the Administrator. However, when special hazard area designations and water surface elevations have been furnished by the Administrator, they shall apply. In all cases the minimum requirements governing the adequacy of the land use and control measures for flood-prone areas adopted by a particular community depend on the amount of technical data formally provided to the community by the Administrator. Minimum standards for communities are as follows:

Emergency Program →

(a) When the Administrator has not defined the special flood hazard areas within a community, has not provided water surface elevation data, and/or has not provided sufficient data to identify the floodway or coastal high hazard area, the community must—

(1) Require building permits for all proposed construction or other improvements in the community;

(2) Review all building permit applications for new construction or substantial improvements to determine whether proposed building sites will be reasonably safe from flooding. If a proposed building site is in a location that has a flood hazard, any proposed new construction or substantial improvement (including prefabricated and mobile homes) must (i) be designed (or modified) and anchored to prevent flotation, collapse, or lateral movement of the structure, (ii) use construction materials and utility equipment that are resistant to flood damage, and (iii) use construction methods and practices that will minimize flood damage;

(3) Review subdivision proposals and other proposed new developments to assure that (i) all such proposals are consistent with the need to minimize flood damage, (ii) all public utilities and facilities, such as sewer, gas, electrical, and water systems are located, elevated, and constructed to minimize or eliminate flood damage, and (iii) adequate drainage is provided so as to reduce exposure to flood hazards; and

(4) Require new or replacement water supply systems and/or sanitary sewage systems to be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters; and require onsite waste disposal systems to be located so as to avoid impairment of them or contamination from them during flooding.

(b) When the Administrator has identified the flood plain area having special flood hazards, but has produced neither water surface elevation data nor data sufficient to identify the floodway or coastal high hazard area, the minimum land use and control measures adopted by the community for the flood plain must—

(1) Take into account flood plain management programs, if any, already in effect in neighboring areas;

(2) Apply at a minimum to all areas identified by the Administrator as flood plain areas having special flood hazards;

(3) Provide that within the flood plain area having special flood hazards, the laws and ordinances concerning land use and control and other measures designed to reduce flood losses shall take precedence over any conflicting laws, ordinances, or codes;

(4) Require building permits for all proposed construction or other improvements in the flood plain area having special flood hazards;

(5) Review building permit applications for major repairs within the flood plain area having special flood hazards to determine that the proposed repair (i) uses construction materials and utility equipment that are resistant to flood damage, and (ii) uses construction methods and practices that will minimize flood damage;

(6) Review building permit applications for new construction or substantial improvements within the flood plain area having special flood hazards to assure that the proposed construction (including prefabricated and mobile homes) (i) is protected against flood damage, (ii) is designed (or modified) and anchored to prevent flotation, collapse or lateral movement of the structure, (iii) uses construction materials and utility equipment that are resistant to flood damage, and (iv) uses construction methods and practices that will minimize flood damage;

(7) Review subdivision proposals and other proposed new developments to assure that (i) all such proposals are consistent with the need to minimize flood damage, (ii) all public utilities and facilities, such as sewer, gas, electrical, and water systems are located, elevated, and constructed to minimize or eliminate flood damage, and (ii) adequate drain-

age is provided so as to reduce exposure to flood hazards; and

(8) Require new or replacement water supply systems and/or sanitary sewage systems to be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters, and require onsite waste disposal systems to be located so as to avoid impairment of them or contamination from them during flooding.

(c) When the Administrator has identified the flood plain area having special flood hazards, and has provided water surface elevations for the 100-year flood, but has not provided data sufficient to identify the floodway or coastal high hazard area, the minimum land use and control measures adopted by the community for the flod plain must—

(1) Meet the requirements of paragraph (b) of this section;

(2) Require new construction or substantial improvements of residential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood;

(3) Require new construction or substantial improvements of non-residential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood or, together with attendant utility and sanitary facilities, to be floodproofed up to the level of the 100-year flood; and

(4) In riverine situations, provide that until a floodway has been designated, no use, including land fill, may be permitted within the flood plain area having special flood hazards unless the applicant for the land use has demonstrated that the proposed use, when combined with all other existing and anticipated uses, will not increase the water surface elevation of the 100-year flood more than 1 foot at any point.

Regular Program →

(d) When the Administrator has identified the riverine flood plain area having special flood hazards, has provided water surface elevation data for the 100-year flood, and has provided floodway data, the land use and control measures adopted by the community for the flood plain must—

(1) Meet the requirements of paragraph (b) of this section;

(2) Require new construction or substantial improvements of residential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood.

(3) Require new construction or substantial improvements of nonresidential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood or, together with attendant utility and sanitary facilities, to be floodproofed up to the level of the 100-year flood;

(4) Designate a floodway for passage of the water of the 100-year flood. The selection of the floodway shall be based on the principle that the area chosen for the floodway must be designed to carry the waters of the 100-year flood, without increasing the water surface elevation of that flood more than 1 foot at any point;

(5) Provide that existing nonconforming uses in the floodway shall not be expanded but may be modified, altered, or repaired to incorporate floodproofing measures, provided such measures do not raise the level of the 100-year flood; and

(6) Prohibit fill or encroachments within the designated floodway that would impair its ability to carry and discharge the waters resulting from the 100-year flood, except where the effect on flood heights is fully offset by stream improvements.

(e) When the Administrator has identified the coastal flood plain area having special flood hazards, has provided water surface elevation data for the 100-year flood, and has identified the coastal high hazard area, the land use and control measures adopted by the local government for the flood plain must—

(1) Meet the requirements of paragraph (b) of this section;

(2) Require new construction or substantial improvements of residential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood;

(3) Require new construction or substantial improvements of nonresidential structures within the area of special flood hazards to have the lowest floor (including basement) elevated to or above the level of the 100-year flood or, together with attendant utility and sanitary facilities, to be floodproofed up to the level of the 100-year flood;

Exhibit A - Page 4

(4) Provide that existing uses located on land below the elevation of the 100-year flood in the coastal high hazard area shall not be expanded; and

(5) Provide that no land below the level of the 100-year flood in a coastal high hazard area may be developed unless the new construction or substantial improvement (i) is located landward of the reach of the mean high tide, (ii) is elevated on adequately anchored piles or columns to a lowest floor level at or above the 100-year flood level and securely anchored to such piles or columns, and (iii) has no basement and has the space below the lowest floor free of obstructions so that the impact of abnormally high tides or wind-driven water is minimized.

[36 FR 24762, Dec. 22, 1971, as amended at 38 FR 1001, Jan. 8, 1973]

§ 1910.4 Required land use and control measures for mudslide areas.

The Administrator generally will provide the data upon which land use and control measures must be based. If the Administrator has not provided sufficient data to furnish a basis for these measures in a particular community, the community may initially use geologic and other data obtained from other Federal or State agencies or from consulting services, pending receipt of data from the Administrator. However, when special hazard area designations and other relevant technical data have been furnished by the Administrator, they shall apply. In all cases the minimum requirements governing the adequacy of the land use and control measures for mudslide-prone raeas adopted by a particular community depend on the amount of technical data formally provided to the community by the Administrator. Minimum standards for communities are as follows:

(a) When the Administrator has determined that a community is subject to mudslides but has not yet identified any area within the community as an area having special mudslide hazards, the community must—

(1) Require the issuance of a permit for any excavation, grading, fill, or construction in the community; and

(2) Require review of each permit application to determine whether the proposed site and improvements will be reasonably safe from mudslides. If a proposed site and improvements are in a location that may have mudslide hazards, a further review must be made by persons qualified in geology and soils engineering; and the proposed new construction, substantial improvement, or grading must (i) be adequately protected against mudslide damage and (ii) not aggravate the existing hazard.

(b) When the Administrator has delineated the mudslide areas having special mudslide hazards within a community, the community must (1) meet the requirements of paragraph (a) of this section and (2) adopt and enforce as a minimum within such area or areas the provisions of the 1970 edition of the Uniform Building Code, sections 7001 through 7006, and 7008 through 7015. The Uniform Building Code is published by the International Conference of Building Officials, 50 South Los Robles, Pasadena, CA 91101.

[36 FR 24762, Dec. 22, 1971, as amended at 38 FR 1001, Jan. 8, 1973]

§ 1910.5 Exceptions because of local conditions.

(a) The requirement that each community must have adopted adequate land use and control measures (consistent with the criteria set forth in this subpart) on or before December 31, 1971, is statutory and cannot be waived. However, the Administrator recognizes that exceptional local conditions may render the adoption of a 100-year flood standard or other standards contained in this subpart premature or uneconomic for a particular community. Consequently, to meet the December 31, 1971, statutory deadline, a community may elect standards of protection which do not fully meet the requirements of § 1910.3 or § 1910.4, subject to the provisions of this section.

(b) All local land use and control measures intended to meet the requirements of this subpart shall be submitted to the Administrator after their adoption. If the adopted ordinances appear to reflect compliance with the requirements of this subpart, they will initially be accepted by the Administrator (without detailed examination) in satisfaction of such requirements, and the sale of flood insurance will be continued or approved for the community submitting them. If the Administrator subsequently determines that the adopted land use and control measures are inadequate, either in general or in some particular aspect, he may require their modification within a specified period of time to meet the requirements of this subpart as a condi-

GPO 1975-677-105/VIII-328

Exhibit B - Page 1

U S DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL INSURANCE ADMINISTRATION
COMMUNITIES PARTICIPATING IN THE NATIONAL FLOOD INSURANCE PROGRAM
AS OF JUNE 30, 1976

COMMUNITIES ARE IN THE EMERGENCY PROGRAM UNLESS DESIGNATED (R) FOR REGULAR
* UNINCORPORATED AREAS ONLY

COLORADO

COMMUNITY NUMBER	NAME		HAZARD AREA IDENTIFIED
080183A	FORT LUPTON, CITY OF (WELD CO.)		MAY 31, 1974 AND JUNE 11, 1976
080061A	FOUNTAIN, CITY OF (EL PASO CO.)		JUNE 21, 1974 AND OCTOBER 24, 1975
080067	FREMONT COUNTY *		AUGUST 16, 1974
080194	FRUITA, TOWN OF (MESA CO.)		JANUARY 24, 1975
080205	GARFIELD COUNTY *		
080035	GEORGETOWN, TOWN OF (CLEAR CREEK CO.) (CLEAR CREEK CO.)		
080071A	GLENWOOD SPRINGS, CITY OF (GARFIELD CO.)		MARCH 01, 1974 AND NOVEMBER 14, 1975
080090	GOLDEN, CITY OF (JEFFERSON CO.)		
080144	GRANADA, TOWN OF (PROWERS CO.)		JULY 16, 1975
080184A	GREELEY, CITY OF (WELD CO.)		MARCH 03, 1974 AND FEBRUARY 28, 1975
080062A	GREEN MOUNTAIN FALLS, TOWN OF (EL PASO CO.)		AUGUST 30, 1974 AND DECEMBER 12, 1975
080195	GREENWOOD VILLAGE, CITY OF (ARAPAHOE CO.)		DECEMBER 27, 1974
080078	GUNNISON COUNTY *		JANUARY 03, 1975
080080A	GUNNISON, CITY OF (GUNNISON CO.)		MARCH 22, 1974 AND DECEMBER 26, 1975
080140B	HAXTUN, TOWN OF (PHILLIPS CO.)		MAY 10, 1974 AND AUGUST 22, 1975
080157A	HAYDEN, TOWN OF (ROUTT CO.)		JUNE 28, 1974 AND MAY 21, 1976
080081	HINSDALE COUNTY *		
080145A	HOLLY, TOWN OF (PROWERS CO.)		MAY 17, 1974 AND JANUARY 16, 1976
080141A	HOLYOKE, TOWN OF (PHILLIPS CO.)		JUNE 28, 1974 AND JANUARY 09, 1976
080206	HUERFANO COUNTY *		
080108A	HUGO, TOWN OF (LINCOLN CO.)		MAY 31, 1974 AND SEPTEMBER 26, 1975
080036A	IDAHO SPRINGS, CITY OF (CLEAR CREEK CO.)		JUNE 14, 1974 AND FEBRUARY 06, 1976
080216	JAMESTOWN, TOWN OF (BOULDER CO.)		JULY 11, 1975
080087	JEFFERSON COUNTY *		NOVEMBER 22, 1974
080189A	JULESBURG, TOWN OF (SEDGWICK CO.)		MAY 24, 1974 AND FEBRUARY 20, 1976
080038A	LA JARA, TOWN OF (CONEJOS CO.)	(R)	
080133	LA JUNTA, CITY OF (OTERO CO.)		APRIL 12, 1974
080097	LA PLATA COUNTY *		
080186A	LA SALLE, TOWN OF (WELD CO.)		MAY 17, 1974
080084	LA VETA, TOWN OF (HUERFANO CO.)		DECEMBER 27, 1974
080026A	LAFAYETTE, CITY OF (BOULDER CO.)		MAY 24, 1974 AND JANUARY 16, 1976
080082	LAKE CITY, CITY OF (HINSDALE CO.)		
085075	LAKEWOOD, CITY OF (JEFFERSON CO.)	(R)	JULY 21, 1972
080148	LAMAR, CITY OF (PROWERS CO.)		MARCH 22, 1974
080101	LARIMER COUNTY *		DECEMBER 27, 1974
080105	LAS ANIMAS COUNTY *		
080022	LAS ANIMAS, CITY OF (BENT CO.)		
080109A	LIMON, TOWN OF (LINCOLN CO.)		JUNE 28, 1974 AND JANUARY 16, 1976
080017A	LITTLETON, CITY OF (ARAPAHOE CO.)		FEBRUARY 01, 1974 AND APRIL 23, 1976
080027	LONGMONT, CITY OF (BOULDER CO.)		OCTOBER 26, 1973
085076B	LOUISVILLE, CITY OF (BOULDER CO.)	(R)	MAY 04, 1973
080103	LOVELAND, CITY OF (LARIMER CO.)		MARCH 01, 1974
080029A	LYONS, TOWN (BOULDER CO.)		DECEMBER 28, 1973 AND APRIL 02, 1976
080123A	MANCOS, TOWN OF (MONTEZUMA CO.)		MAY 17, 1974
080063A	MANITOU SPRINGS, CITY OF (EL PASO CO.)		MARCH 29, 1974 AND FEBRUARY 21, 1975
080134A	MANZANOLA, TOWN OF (OTERO CO.)	(R)	
080197	MARBLE, TOWN OF (GUNNISON CO.)		
080151A	MEEKER, TOWN OF (RIO BLANCO CO.)		JUNE 28, 1974 AND APRIL 09, 1976
080115	MESA COUNTY *		OCTOBER 18, 1974
080187A	MILLIKEN, TOWN OF (WELD CO.)		MAY 17, 1974 AND MARCH 12, 1976
080053A	MINTURN, TOWN OF (EAGLE CO.)		AUGUST 16, 1974 AND APRIL 09, 1976
080270	MOFFAT COUNTY *		
080155	MONTE VISTA, CITY OF (RIO GRANDE CO.)		FEBRUARY 01, 1974
080285	MONTEZUMA COUNTY *		
080124	MONTROSE COUNTY *		AUGUST 30, 1974
080125A	MONTROSE, CITY OF (MONTROSE CO.)		FEBRUARY 15, 1974 AND APRIL 30, 1976
080064	MONUMENT, TOWN OF (EL PASO CO.)		MAY 24, 1974
080092A	MORRISON, TOWN OF (JEFFERSON CO.)		SEPTEMBER 13, 1974 AND

Exhibit B - Page 2

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL INSURANCE ADMINISTRATION
COMMUNITIES PARTICIPATING IN THE NATIONAL FLOOD INSURANCE PROGRAM
AS OF JUNE 30, 1976

COMMUNITIES ARE IN THE EMERGENCY PROGRAM UNLESS DESIGNATED (R) FOR REGULAR
* UNINCORPORATED AREAS ONLY

COLORADO

COMMUNITY NUMBER	NAME		HAZARD AREA IDENTIFIED
			MARCH 26, 1976
080126A	NATURITA, TOWN OF (MONTROSE CO.)		MAY 17, 1974 AND
			JANUARY 09, 1976
080257	NORTHGLENN, CITY OF (ADAMS CO.)		AUGUST 22, 1975
080167	NORWOOD, TOWN OF (SAN MIGUEL CO.)		NOVEMBER 22, 1974
080186A	NUNN, TOWN OF (WELD CO.)		AUGUST 30, 1974 AND
			DECEMBER 12, 1975
080158A	OAK CREEK, TOWN OF (ROUTT CO.)		MAY 17, 1974 AND
			DECEMBER 19, 1975
080128A	OLATHE, TOWN OF (MONTROSE CO.)		JUNE 28, 1974
080132	OTERO COUNTY *		NOVEMBER 22, 1974
080136	OURAY COUNTY *		
080137	OURAY, CITY OF (OURAY CO.)		MAY 24, 1974
080019A	PAGOSA SPRINGS, TOWN OF (ARCHULETA CO.)		JUNE 07, 1974 AND
			JANUARY 09, 1976 AND
			JUNE 07, 1974
080065	PALMER LAKE, TOWN OF (EL PASO CO.)		NOVEMBER 16, 1973
080045A	PAONIA, TOWN OF (DELTA CO.)		MAY 24, 1974
080139	PARK COUNTY *		
080189A	PIERCE, TOWN OF (WELD CO.)		NOVEMBER 29, 1974 AND
			MARCH 26, 1976
080287	PITKIN COUNTY *		
080190A	PLATTEVILLE, TOWN OF (WELD CO.)		APRIL 12, 1974
080220	PONCHA SPRINGS, TOWN OF (CHAFFEE CO.)		AUGUST 29, 1975
080272	PROWERS COUNTY *		
080147	PUEBLO COUNTY *		OCTOBER 25, 1974
080066A	RAMAH, TOWN OF (EL PASO CO.)		SEPTEMBER 13, 1974 AND
			FEBRUARY 20, 1976
080152A	RANGELY, TOWN OF (RIO BLANCO CO.)		APRIL 12, 1974 AND
			DECEMBER 26, 1975
080048	RICO, TOWN OF (DOLORES CO.)		DECEMBER 20, 1974
080138A	RIDGWAY, TOWN OF (OURAY CO.)		NOVEMBER 08, 1974 AND
			JANUARY 23, 1976
080153	RIO GRANDE COUNTY *		
080135	ROCKY FORD, CITY OF (OTERO CO.)		APRIL 05, 1974
080031A	SALIDA, CITY OF (CHAFFEE CO.)		MAY 03, 1974 AND
			JANUARY 30, 1976
080267	SAN JUAN COUNTY *		
080039A	SAN LUIS, TOWN OF (COSTILLA CO.)		MAY 24, 1974 AND
			MARCH 05, 1976
080171	SEDGWICK, TOWN OF (SEDGWICK CO.)		NOVEMBER 08, 1974
080018A	SHERIDAN, CITY OF (ARAPAHOE CO.)		MAY 03, 1974 AND
			JANUARY 23, 1976
080201	SILVERTHORNE, TOWN OF (SUMMIT CO.)		JULY 25, 1975
080165A	SILVERTON, TOWN OF (SAN JUAN CO.)		JUNE 14, 1974 AND
			MAY 28, 1976
080159	STEAMBOAT SPRINGS, TOWN OF (ROUTT CO.)		DECEMBER 27, 1974
080203	SUPERIOR, TOWN OF (BOULDER CO.)		JUNE 04, 1976
080168A	TELLURIDE, TOWN OF (SAN MIGUEL CO.)		JUNE 28, 1974 AND
			JANUARY 02, 1976
080007	THORNTON, CITY OF (ADAMS CO.)		NOVEMBER 01, 1974
080107	TRINIDAD, CITY OF (LAS ANIMAS CO.)		JUNE 28, 1974
080086A	WALDEN, TOWN OF (JACKSON CO.)		JUNE 28, 1974
080083A	WALSENBURG, CITY OF (HUERFANO CO.)		JANUARY 23, 1974 AND
			MARCH 05, 1976
080021A	WALSH, TOWN OF (BACA CO.)	(R)	
080266	WELD COUNTY *		
080104A	WELLINGTON, TOWN OF (LARIMER CO.)		MARCH 22, 1974
080008A	WESTMINISTER, CITY OF (ADAMS CO.)		JUNE 07, 1974 AND
			APRIL 23, 1976
085079	WHEAT RIDGE, CITY OF (JEFFERSON CO.)	(R)	MAY 26, 1972
080204	WIGGINS, CITY OF (MORGAN CO.)		
080175A	WOODLAND PARK, TOWN OF (TELLER CO.)		JUNE 07, 1974 AND
			MARCH 26, 1976
080191A	WRAY, CITY OF (YUMA CO.)		MARCH 15, 1974 AND
			JANUARY 16, 1976
080265	YUMA, TOWN OF (YUMA CO.)		

TOTAL IN THE FLOOD PROGRAM	163
TOTAL IN THE REGULAR PROGRAM	9
TOTAL IN THE EMERGENCY PROGRAM	154
TOTAL IN THE EMERGENCY PROGRAM WITH HAZARD AREA IDENTIFIED	126

Exhibit B - Page 3

U S DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL INSURANCE ADMINISTRATION
AREAS SUSPENDED OR WITHDRAWN FROM PROGRAM
AS OF JUNE 30,1976

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(W) WITHDREW FROM PROGRAM
* UNINCORPORATED AREAS ONLY

COLORADO

COMMUNITY NUMBER	NAME		SUSPENSION DATE
085077A	PUEBLO, CITY OF (PUEBLO CO)		APRIL 30, 1976
085078A	RIFLE, CITY OF (GARFIELD CO)		JANUARY 15, 1975
	TOTAL IN THE STATE	2	

Exhibit B - Page 4

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL INSURANCE ADMINISTRATION
AREAS WHICH HAVE HAD SPECIAL FLOOD AREAS IDENTIFIED
- NOT IN THE PROGRAM -

AS OF JUNE 30, 1976
* UNINCORPORATED AREAS ONLY

COLORADO

COMMUNITY NUMBER	NAME	HAZARD AREA IDENTIFIED	
080229	AGUILAR, TOWN OF (LAS ANIMAS CO)	JULY 11, 1975	
080003	BENNETT, TOWN OF [ADAMS CO]	NOVEMBER 22, 1974	
080148A	BOONE, TOWN OF [PUEBLO CO]	SEPTEMBER 06, 1974	AND
		JANUARY 09, 1976	
080232	BOW MAR TOWN [ARAPAHOE + JEFFERS]	APRIL 23, 1976	
080210	COAL CREEK TOWN [FREMONT CO]	AUGUST 15, 1975	
080111	CROOK, TOWN OF [LOGAN CO]	NOVEMBER 08, 1974	
080236	DACONO TOWN [WELD CO]	SEPTEMBER 05, 1975	
080237	DILLON TOWN [SUMMIT CO]	AUGUST 08, 1975	
080120A	DINOSAUR, TOWN OF [MOFFAT CO]	AUGUST 30, 1974	
080047A	DOVE CREEK, TOWN OF [DOLORES CO]	MAY 24, 1974	AND
		NOVEMBER 28, 1975	
080238	EAGLE TOWN [EAGLE CO]	AUGUST 15, 1975	
080056A	ELIZABETH, TOWN OF [ELBERT CO]	SEPTEMBER 06, 1974	AND
		FEBRUARY 06, 1976	
080212	EMPIRE, TOWN OF (CLEAR CREEK CO)	MAY 02, 1975	
080239	FAIRPLAY TOWN [PARK CO]	JULY 18, 1975	
080240	FEDERAL HEIGHTS TOWN[ADAMS CO]	JULY 11, 1975	
080241	FIRESTONE TOWN [WELD CO]	SEPTEMBER 19, 1975	
080242	FLAGER TOWN [KIT CARSON CO]	SEPTEMBER 19, 1975	
080112	FLEMING, TOWN OF [LOGAN CO]	NOVEMBER 08, 1974	
080073A	FRASER, TOWN OF [GRAND CO]	SEPTEMBER 06, 1974	
080244	FREDERICK TOWN [WELD CO]	SEPTEMBER 26, 1975	
080213	GILCREST TOWN [WELD CO]	AUGUST 22, 1975	
080117A	GRAND JUNCTION, CITY OF [MESA CO]	FEBRUARY 01, 1974	AND
		JUNE 28, 1974	
080214	GRAND LAKE TOWN [GRAND CO]	AUGUST 15, 1975	
080074A	HOT SULPHUR SPRINGS, TOWN OF [GRAND CO]	NOVEMBER 22, 1974	
080044	HOTCHKISS, TOWN OF [DELTA CO]	JUNE 21, 1974	
080268A	IGNACIO, TOWN (LA PLATA CO)	MARCH 22, 1974	
080207	ILIFF, TOWN OF [LOGAN CO]	DECEMBER 27, 1974	
080251	KEENESBURG TOWN [WELD CO]	SEPTEMBER 19, 1975	
080057A	KIOWA, TOWN OF [ELBERT CO]	SEPTEMBER 06, 1974	AND
		FEBRUARY 27, 1976	
080033	KIT CARSON, TOWN OF [CHEYENNE CO]	DECEMBER 13, 1974	
080096A	LEADVILLE, CITY OF [LAKE CO]	MAY 17, 1974	
080253	MANASSA TOWN [CONEJOS CO]	AUGUST 08, 1975	
080254	MOUNTAIN VIEW TOWN [JEFFERSON CO]	MARCH 26, 1976	
080255	NEDERLAND TOWN [BOULDER CO]	AUGUST 22, 1975	
080256	NEW CASTLE TOWN [GARFIELD CO]	JULY 25, 1975	
080127A	NUCLA, TOWN OF [MONTROSE CO]	MAY 24, 1974	AND
		MARCH 26, 1976	
080259	ORDWAY TOWN [CROWLEY CO]	AUGUST 22, 1975	
080178A	OTIS, TOWN OF [WASHINGTON CO]	MAY 24, 1974	AND
		OCTOBER 31, 1975	
080170	OVID, TOWN OF [SEDGWICK CO]	NOVEMBER 15, 1974	
080260	REDCLIFF TOWN [EAGLE CO]	SEPTEMBER 19, 1975	
080221	ROCKVALE TOWN [FREMONT CO]	JUNE 27, 1975	
080150	RYE, TOWN [PUEBLO CO]	JULY 18, 1975	
080164	SAGAUCHE, TOWN [SAGAUCHE CO]	MAY 28, 1976	
080223	SILT TOWN [GARFIELD CO]	JULY 25, 1975	
080200	SILVER PLUME, TOWN OF (CLEAR CREEK CO)	DECEMBER 13, 1974	
080058	SIMLA, TOWN OF [ELBERT CO]	SEPTEMBER 13, 1974	
080106A	STARKVILLE, TOWN OF [LAS ANIMAS CO]	SEPTEMBER 06, 1974	AND
		JANUARY 23, 1976	
080263	STRATTON TOWN [KIT CARSON CO]	MARCH 26, 1976	
080224	SUGAR CITY TOWN [CROWLEY CO]	AUGUST 15, 1975	
080226	VICTOR CITY [TELLER CO]	MAY 02, 1975	
080264	WINDSOR TOWN [WELD CO]	MARCH 26, 1976	
080160A	YAMPA TOWN OF [ROUTT CO]	MAY 24, 1974	AND
		JANUARY 02, 1976	

TOTAL IN THE STATE 52

Water Quality Control - Regulation of Real Estate Development

WATER QUALITY CONTROL -- REGULATION OF DEVELOPMENT

Henry W. Ipsen

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1969-1971: Assistant Attorney General, Environment Division, State of Washington, Olympia, Washington.

WATER POLLUTION CONTROL

by

Henry W. Ipsen

I. THE FEDERAL WATER POLLUTION CONTROL ACT, 33 U.S.C. §1251 et seq.

The Act represents a culmination of twenty-five years of federal legislation in the field of water pollution control. The majority of the Act's provisions are administered by the U.S. Environmental Protection Agency (EPA), in conjunction with the states.

A. Major Goals and Objectives of the FWPCA.

The Act seeks to achieve water quality suitable for recreational contact and for protection and propagation of fish and wildlife by 1983. It further establishes a national goal that discharges of pollutants be eliminated by 1985. The three most important programs established by the FWPCA are:

1. An expanded system of federal grants to plan and construct publicly-owned waste treatment plants;
2. A permit program which has been established to control pollutant discharges from point sources;
3. Development of state water quality management plans to insure maintenance of water quality.

B. Construction Grants.

The FWPCA (33 U.S.C. §1282, §1283) makes available federal financial assistance in the amount of 75% of the cost of municipal sewage treatment works. These grant moneys are dispersed through priority rating systems adopted by each state. Before approving any grants for construction of the treatment works, EPA must determine that the municipal applicant has adopted a system of user charges insuring that all recipients of waste treatment services pay their proportionate share of the cost of operating and maintaining the system; and further, that the applicant will require industrial users of the system to repay a proportion of the federal grant corresponding to its percentage use of the plant's total capacity.

In addition, EPA must determine that the proposed treatment works will meet certain performance standards.

Grants are given for three stages of planning and construction:

Step 1 Grants are for facilities plans or preliminary engineering reports.

Step 2 Grants are for final plans and specifications.

Step 3 Grants are for actual construction. A recently enacted public works jobs law (PL 94-369) provides money that could be used for the local share of construction costs (25%). EPA is now developing regulations to implement this statute.

C. Standards and Permits.

1. Water Quality Standards.

Interstate water quality standards were initially established by the predecessors to the 1972 Act. §303 of the 1972 Act (33 U.S.C. §1313) expanded application of these standards to intrastate waters. Water quality standards are ambient stream standards with two main elements:

a. Stream classification, i.e. cold water fishery, public water supply, industrial, etc.

b. Use criteria, i.e. permissible levels of dissolved oxygen, suspended solids, pH, etc.

2. Effluent Limitations.

Effluent limitations or standards are requirements imposed on discharges which relate to the amount of pollutants which they may discharge. Under the Act, these limitations are generally based on the availability of pollution control technology. These limitations define actual performance levels rather than prescribing specific control techniques, practices, or equipment.

The Act provides for a variety of effluent limitations which can be summarized as follows:

a. By July 1, 1977, industries must meet "Best Practicable Control Technology" (BPCT) (33 U.S.C. §1311(b)(1)(A)).

b. By July 1, 1983, industries must meet "Best Available Control Technology" (BACT) economically achievable (33 U.S.C. §1311(b)(2)(A)). BPCT and BACT are to be defined by guidelines developed by EPA for the various industrial categories pursuant to 33 U.S.C. §1314. These guidelines are codified at 40 C.F.R. Subchapter N. EPA's effluent guidelines have been subjected to a variety of challenges and judicial interpretations. The Supreme Court has agreed to hear argument on the procedural and substantive aspects of these guidelines. The Supreme Court's review will be in the context of two Fourth Circuit decisions, both named *DuPont v. Train* (7 ERC 1065 and 8 ERC 1718), on the inorganic chemical guidelines.

c. By July 1, 1977, municipalities must meet secondary treatment requirements (33 U.S.C. §1311(b)(1)(B)). One Court has held that this requirement must be met even if a municipality is unable to obtain federal funding. See *State Water Control Board v. Train*, ____ F.Supp. ____ (E.D. Va. 1976). EPA's definition of "secondary treatment" is in 40 C.F.R. Part 133.

d. By July 1, 1977, industries and municipalities must achieve even more stringent requirements, if necessary to meet applicable water quality standards, or any other state and federal requirements (33 U.S.C. §1311(b)(1)(C)).

e. 33 U.S.C. §1316 provides for the setting of national standards of performance for newly-constructed facilities.

f. 33 U.S.C. §1317 provides for the setting of toxic effluent standards for sources that discharge toxic pollutants, as such are defined by EPA. This section also provides for pretreatment requirements which apply to dischargers to publicly-owned treatment works.

3. Permits.

a. The regulatory mechanism for applying the above-described water quality standards and effluent limitations to individual dischargers is a waste discharge permit program called the National Pollutant Discharge Elimination System (NPDES), which is authorized by 33 U.S.C. §1342. 33 U.S.C. §1311(a) of the Act provides that any discharger of pollutants into waters of the United States must seek and obtain a permit from EPA pursuant to the provisions of §1342. Permits issued by EPA contain effluent limitations, water quality standards, and various other monitoring requirements.

b. The jurisdictional scope of the permit program is confined to discharges of "pollutants" from "point sources" to "navigable waters." The term "pollutant" is broadly defined by the Act (33 U.S.C. §1362(6)) to include almost anything. The term "point source" is defined as a pipe, ditch, channel, and other confined and discrete conveyance (§1362(14)). Court decisions have interpreted this term to include dump trucks, bulldozers, and drag lines in artificial channels. See Weiszmann v. Corps of Engineers, 7 ERC 1523; U.S. v. Holland, 373 F.Supp. 665. The term "navigable waters" has been interpreted by several federal court decisions to include virtually all surface watercourses in the U.S. See 33 U.S.C. §1362(a) and U.S. v. Ashland Oil Co., 504 F.2d 137. However, the status of groundwater under the Act is still uncertain. See U.S. v. GAF Corp., 7 ERC 1581.

c. The responsibility for issuing waste discharge permits is vested in EPA (§1342(a)); however, states with qualified programs may take over the administration of the program (§1342(6)). Colorado has recently been delegated the responsibility for administering the NPDES program. However, EPA retains the right to review permits issued by the state, and can veto individual permits (§1342(d)(2)). The Supreme Court recently held that state NPDES programs do not have jurisdiction over federal facilities. See EPA v. California (June 7, 1976).

d. Section 309 provides a broad range of authority to EPA to enforce these permits. Such authority includes the authority to proceed in court to obtain injunctions (§1319(b)), and to seek civil and criminal penalties (§1319(c) and (d)) against permit violators.

D. Planning Requirements.

1. Primary functions of planning requirements in the FWPCA:

   a. To insure that NPDES permits will meet water quality standards.

   b. Control of pollution from nonpoint sources.

   c. To insure that citing of waste treatment facilities will anticipate population growth and industrial development.

2. 33 U.S.C. §§1288 and 1313 are the major planning provisions of the FWPCA.

   a. Section 1313 -- water quality management plans and waste load allocations.

   Section 1313(e) requires each state to develop a continuing planning process for water quality. The primary element of this process is a state water quality management plan, which is to serve as an "umbrella" or master plan for all state water quality planning activities. The principal objective of this plan is to insure achievement of the FWPCA's 1983 water quality goals for those areas where such goals are feasible and obtainable. The most important ingredient of the water quality management plan is the establishment of waste load allocations for various stream segments. Each state must specify those stream segments where, for some reason, normal effluent standards will not by themselves achieve the applicable ambient stream standard. For such problem areas, called "water quality related stream segments," the states must adopt total maximum daily loading requirements for certain pollutants, such as BOD, suspended solids and various toxic substances. These total maximum daily loading requirements are then allocated among the various point source discharges along the stream and are reflected in more stringent NPDES permits. The first phase of planning under §303 is supposed to be completed by July 1, 1976. In Colorado, water quality management plans have already been prepared for all major drainage basins in the state: the Colorado, Arkansas, South Platte, North Platte, San Juan, Rio Grande, Republican, Cimarron, and White-Yampa basins.

b. Section 1288: areawide waste treatment management plans ("208 plans"):

Because of the existence of numerous nonpoint sources of pollution in many drainage basins, waste load allocation developed in the phase 1 plan will not achieve water quality standards without some restriction on nonpoint sources. It is to this problem of nonpoint sources that §1288 of the Act is primarily addressed.

The primary purpose of §1288 is to develop new pollution control techniques in those areas where substantial water quality problems result from urban industrial concentrations or other factors. The §1288 planning requirements are meant to join with the other FWPCA programs as part of a total effort to reach 1983 water quality goals established by the Act. The water quality management plans produced under §1288 are supposed to meet the following objectives:

(1) Anticipate municipal and industrial waste treatment needs,

(2) Establish priorities for construction of new waste treatment facilities,

(3) Regulate the modification, construction, and siting of waste treatment facilities, and

(4) Establish procedures and methods to control nonpoint sources of pollution. It is this last element which gives the 208 plans their great importance.

Plans under §1288 are to be prepared by areawide waste treatment planning agencies. These agencies and their geographical boundaries are usually designated by the governor or by local officials. EPA must review and approve all boundary and planning agency designations. In all other areas where there has been no formal designation of a planning agency, the state must act as the planning agency. Once an agency has been designated, it (or the state) must proceed with preparation of the plan.

The 208 planning process must be in operation not later than one year after the date of designation of the planning agency. A plan prepared in accordance with this planning process must be completed within two years after the planning process begins. As a result, a 208 planning agency has no more than three years to prepare its management plan. Upon completion, the plan must be certified by the governor, and approved by the EPA. Annual review is required.

The statutorily-required content of any 208 management plan indicates its tremendous impact on real estate development:

(1) Identification of treatment works necessary to meet municipal and industrial waste treatment needs for a twenty-year period; this must include any land acquisition requirements as well as a system for financing and construction of new facilities.

(2) Establishment of construction priorities and time schedules for the treatment facilities.

(3) Establishment of regulations to:

    (i) Insure that waste treatment management is on an areawide basis and provides treatment for all pollution sources;

    (ii) Regulate the location, construction, and modification of any pollutant discharges in the area; and

    (iii) Assure that all waste discharge treatment works shall meet pretreatment requirements for industrial waste.

(4) The identification of a waste treatment management agency or agencies.

(5) The identification of measures necessary to carry out the plan, and the time elements involved.

(6) A process to identify land use controls for various nonpoint sources of pollution, such as runoff from agricultural and silvicultural operations, mining, and construction activities.

(7) A process to protect against contamination of surface and groundwater from on-land disposal of waste.

c. §1288 Planning Designations in Colorado.

At the present time six 208 areas and their respective planning agencies have been designated in Colorado:

(1) The Greater Denver Metropolitan Area, comprised of the City and County of Denver, and Adams, Arapahoe, Jefferson, and Boulder Counties, for which the Denver Regional Council of Governments is the designated planning agency;

(2) Teller and El Paso Counties (Colorado Springs), for which the Pikes Peak Area COG is the designated planning agency;

(3) Pueblo County, for which the Pueblo Area COG is the designated planning agency;

(4) Larimer-Weld Counties, for which the Larimer-Weld COG is the designated planning agency;

(5) Routt, Jackson, Grand, Summit, Eagle, and Pitkin Counties, for which the Northwest Colorado COG is the designated planning agency;

(6) Moffat, Rio Blanco, Garfield, and Mesa Counties, for which the Colorado West Area COG is the designated planning agency.

E. Other Programs.

1. 33 U.S.C. §1344 -- Dredge and Fill Permits.

The Army Corps of Engineers may issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites. With certain exceptions described in COE regulations, any discharge of over one cubic yard of any material into "navigable waters" will require a permit from the Corps. Under the most recent COE regulations (40 Fed. Reg. 31320; 7/25/75). The statute was to have a phased implementation: the program was immediately extended to cover waters which are navigable in fact and their adjacent wetlands. After July 1, 1976, the program was to be extended to primary tributaries and lakes of over five surface acres. After July 1, 1977, all other waterways, with the exception of drainage and irrigation ditches and stock watering ponds, were to be covered. However, President Ford by executive order suspended application of "phase II" until September 1, 1976. It is now unclear whether the phased regulations will ever go into effect, since §1344 may be drastically amended by Congress in the near future.

2. 33 U.S.C. §1321 -- Control of Pollution by Oil.

§1321(b) prohibits the discharge of "harmful quantities" of oil and hazardous substances into the navigable waters and provides for the assessment of civil penalties against persons who violate this prohibition. The definition of a "harmful quantity" of oil is set out in 40 C.F.R. Part 110. EPA is still developing a list of hazardous substances to which the prohibition of §1321(b) will apply. §1321 also provides for criminal penalties for failure to give immediate notification of a spill of oil or hazardous substance (§1321 (b)(5)), for spill prevention plans (§1321(j)), and for spill clean-up by the discharger or the federal government. §1321 is jointly administered by EPA and the Coast Guard.

F. Application of NEPA to the Federal Water Pollution Control Act.

The National Environmental Policy Act, 42 U.S.C. §4321 et seq., has only limited application to the FWPCA. 33 U.S.C. §1371(c) provides that, except for the federal financing of sewage treatment plants and the issuance of permits to new sources (see the definition of "new source" in §1316 (a)(2)), no action of the Administrator under the FWPCA shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of NEPA. Thus, with the exceptions of new source permits and sewage treatment plant financing, the Administrator need not prepare an environmental impact statement for any of his activities under the FWPCA. EPA regulations on development of impact statements for federal financing of sewage treatment plans have been published at 40 Fed. Reg. 16814 (April 14, 1975). EPA has recently proposed regulations setting out procedures for applying NEPA to the issuance of new source permits. These regulations will not apply to issuance of new source permits by states with approved NPDES programs. It is EPA's position that NEPA does not apply to the states, and therefore the states will not be required to prepare impact statements for permits issued under the NPDES (although impact statements may be required under equivalent state statutes).

It is important to note that an environmental impact statement prepared pursuant to these regulations would not be confined to anticipated impact on water quality. The statement would be required to discuss potential adverse affects not only on water quality, but also air pollution, undesirable land use patterns, damage to ecological systems, urban congestion, threats to health, or other consequences adverse to the environmental goals set out in 43 U.S.C. §4321(b), which contains an extremely comprehensive policy statement.

In a notice entitled "Environmental Assessment Requirements," dated September 20, 1974 (39 Fed. Reg. 35202), EPA informed all potential applicants for new source permits that they should request a pre-application conference with EPA a minimum of 24 months prior to commencement of any discharge. However, these requirements have no application to sources located within Colorado.

II. THE COLORADO WATER QUALITY CONTROL ACT, §25-8-101, et seq., C.R.S. 1973.

A. Administering Organizations and Their Respective Responsibilities.

1. The Water Quality Control Commission (C.R.S. §25-8-201).

2. General duties of the Commission (C.R.S. §25-8-202):

    a. Promulgates water quality standards, including stream classifications (C.R.S. §§25-8-203 and 204);

    b. Promulgates regulations relating to waste discharge treatment requirements (C.R.S. §25-8-205);

c. Promulgates waste discharge permit regulations (C.R.S. §25-8-501);

d. Administers federal and state grant funds for municipal sewage treatment works (C.R.S. §25-8-702);

e. Reviews the adequacy of local governmental regulations for individual sewage disposal systems and can prescribe requirements for such systems (C.R.S. §25-8-505);

f. Reviews applications for underground detonations and discharges (C.R.S. §25-8-505).

3. The Division of Administration of the State Department of Health. The Division is required by §25-8-301 to maintain a separate water quality agency, which is known as the Water Quality Bureau.

4. General duties of the Division (§25-8-302):

   a. Carries out the enforcement provisions of Chapter 25-8;

   b. Administers the waste discharge permit system which has been delegated to the State of Colorado by EPA (see §§25-8-501 and 506);

   c. Monitors state waters and waste discharges to such waters (C.R.S. §25-8-303), and has the authority to enter and inspect premises and records (C.R.S. §25-8-306).

B. Jurisdictional Scope of Chapter 25-8.

Like the FWPCA, the Act essentially prohibits the discharge of wastes to state waters. "State waters" are defined as any and all surface and subsurface waters which are contained in or flow in or through this state, except in treatment works of disposal systems, water in potable water distribution systems, and all water withdrawn for use until use and treatment have been completed (§25-8-103(16)). The State Attorney General has opined that irrigation ditches are included within the foregoing definitions (A.G. Op. 74-0034, August 26, 1974). The scope of the Colorado Act is probably broader than the scope of the FWPCA, since the latter may not extend to groundwater in certain circumstances. (U.S. v. GAF Corp., 7 ERC 1581).

C. Practical Aspects of Administration.

1. The Commission has promulgated regulations for the administration of the Colorado permit program. The program is being administered by the Water Quality Bureau of the Division of Administration.

2. Persons who intend to discharge wastes to state waters must apply to the Division at least 180 days in advance of the date of commencement of the discharge. If the Division delays in issuing the permit beyond 180 days of submission of the application, the applicant may commence his discharge without the permit.

3. The Division will probably utilize federal application forms, copies of which are attached as an appendix to this outline. Application fees are $100.00, and each permit holder must pay an annual charge of $50.00 after the first year the permit is in effect.

D. Permit Issuance Procedure.

Upon receipt of an application, the Division, with the assistance of EPA, drafts a proposed permit. Once the permit is drafted, the permit is submitted to EPA for review, and public notice is published in local newspapers (§25-8-502). The Division is required to provide a period of at least 30 days following the date of public notice during which time interested persons may comment on the proposed permit. Such persons may request a public hearing on the permit and, if they wish to challenge the final issuance of the permit, they may request a hearing under the State Administrative Procedure Act (§24-4-101 et seq., C.R.S. 1973).

E. Standard Contents of a Waste Discharge Permit:

1. Location, quantity, and quality characteristics of the permitted discharge;

2. Treatment requirements prior to discharge;

3. Guidelines for equipment and procedures required for monitoring, record keeping, and reporting requirements;

4. Schedule of compliance with applicable effluent limitations;

5. The requirements imposed in a state permit must be at least as stringent as the requirements imposed by the FWPCA.

F. Pollution Control Regulations.

The Water Quality Control Commission has promulgated a series of regulations covering various types of water pollution problems. The contents of waste discharge permits issued by the Division must incorporate these regulations, wherever applicable:

1. Regulations for Effluent Limitations (effective August 21, 1975).

2. Rules for Subsurface Disposal Systems (effective May 1, 1974).

3. Regulations prohibiting the operation of a sewage treatment works for which a site approval has not been obtained (effective August 21, 1975).

4. Regulations prohibiting the discharge of certain wastewaters to storm sewers and prohibiting certain connections to storm sewers (effective August 2, 1975).

G. State Enforcement.

1. The Division may issue Notices of Violation and Cease and Desist Orders, or it may suspend or revoke permits held by violators (§§25-8-602, 603, 604, and 605, C.R.S. 1973).

2. The Division may request the local district attorney or the State Attorney General's Office to bring suit for injunctive relief and civil or criminal penalties (§§25-8-607, 608, and 609, C.R.S. 1973).

III. THE SAFE DRINKING WATER ACT, PL 93-523.

A. Scope of the Act, §§1401, 1411.

The Act provides a mechanism whereby states may assume primary enforcement responsibility over public water systems and underground injections. The Act is applicable to all water systems providing piped water for human consumption that have at least 15 service connections or regularly serve at least 25 people. This includes not only communities, but also mobile home parks, roadside restaurants and motels, highway rest stops, campgrounds and other recreational areas.

B. National Drinking Water Regulations, §1412.

1. Primary Standards:

The Administrator of EPA in March, 1975, published proposed national interim primary drinking water regulations, which will be effective in June, 1977. Primary drinking water regulations are designed to protect health, using available and feasible treatment techniques. The Administrator is further required to promulgate revised national primary drinking water regulations following completion of a study by the National Academy of Sciences on recommended maximum containment levels in drinking water. These standards are enforceable by EPA or by states operating EPA-approved programs (§§1413, 1414).

2. Secondary Standards:

Secondary drinking water standards affecting welfare are now being developed by EPA. These standards are really only guidelines and are not directly enforceable by EPA (§1414).

C. Protection of Underground Sources of Drinking Water, §1421.

Because of increased instances of contamination of water supplies resulting from disposal of wastes through ground injection, the Act includes a special authority for EPA, empowering it to require particular states to initiate a program of underground injection control. These regulations will require persons injecting pollutants underground to obtain a permit and to show that the injection will not endanger drinking water sources. EPA will be holding a regional hearing in Denver on underground injection regulations. The hearing is scheduled for October 6, 1976. In all likelihood, Colorado will be included in the list of states required to institute such a program (for a good discussion of the SDWA as it pertains to Colorado, see Raisch, "Safe Drinking Water Act, What It Says and Means," Colorado Municipalities Magazine, May/June, 1976).

D. Emergency Powers, §1431.

The Act empowers the Administrator of EPA to "take such actions as he may deem necessary" in an emergency involving "imminent and substantial endangerment" to a public water supply.